No. 4452

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM CARLSEN, JOHN SAUDER and AETNA LIFE INSURANCE COMPANY (a corporation), claimants,

Appellants,

vs.

A. PALADINI, INC. (a corporation),

Appellee.

BRIEF FOR APPELLEE.

HOMER LINGENFELTER,
Balfour Building, San Francisco,
IRA S. LILLICK,
Balfour Building, San Francisco,
Proctors for Appellee.

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I. STATEMENT OF THE CASE.

This is an appeal from a final decree of the District Court in a limitation of liability proceeding wherein petitioner sought to limit its liability for personal injury claims arising from a towage accident upon the Pacific Ocean on a voyage from Drake's Bay to San Francisco. The petition is in the usual form with a prayer in the common alternative, viz.: that the absence of liability be decreed or that liability be limited.

Four claims were filed with the Commissioner, the first by claimant William Carlsen, for personal

injuries, in the sum of $50,960.00; the second by claimant John Sauder for personal injuries in the sum of $50,800.00, and the third by claimant Aetna Life Insurance Company, a corporation, claiming jointly with claimant William Carlsen, in the sum of $5960.00 by virtue of the subrogation provisions of the Workmen's Compensation and Safety Act of 1917 of the State of California; and the fourth by said claimant Aetna Life Insurance Company, a corporation, claiming jointly with claimant John Sauder, in the sum of $50,800.00 by virtue of said subrogation provisions of said Workmen's Compensation Act. The claimants answered the petition, denied that petitioner was without privity or knowledge, and alleged that petitioner was guilty of an act of specific negligence, to-wit: the use of a "rotten, unsound and defective" tow line and bridle. Upon the two issues thus joined the District Court decreed, *first,* upon the issue of limitation of liability, that the accident did not occur with the privity or knowledge of petitioner, and *second,* upon the issue of negligence that the accident was not caused by the design or negligence of petitioner, and accordingly denied the liability of petitioner *in toto* and perpetually enjoined the maintenance of actions upon said claims. From this final decree of the District Court all of said claimants have appealed.

We shall not discuss or outline the facts at length in this introductory portion of our brief. However,

in completion of the narrative on page 3 of claimants' brief we desire here to point out that although petitioner, under its contract with Healy-Tibbitts Construction Company was to freight and deliver at Point Reyes all materials and equipment necessary to complete the wharf, deliver supplies three times a week, and on completion, transport all equipment back to San Francisco, yet *petitioner was not by its contract obligated to transport the Healy-Tibbitts employes either to Point Reyes or back to San Francisco.* It is not contended that the men were brought back under any contract with them direct, such as the payment of a fare, so that in considering this case, it should be borne in mind that there was no contractual bond whatsoever existing between petitioner and claimants, therefore any liability asserted by claimants must be founded upon tort.

We will correct also what appears to be an oversight of claimants in stating a certain dimension of the towing bridle. In claimants' statement on page 4 of their brief, they say "The thimble and swivel were connected to a *bridle made of 5/8 or 7/8 inch steel cable,*" although on page 18 of their brief they state that the bridle was of "a 5/6 inch or a 7/8 inch steel cable." Both statements are partly incorrect. The bridle was constructed of *3/4* inch or 7/8 inch steel cable as shown by the portions of the record cited by claimants on page 18 of their brief

(Figari, 157, 158; Westman, 156; Davis, 179; Lingenfelter, 396).

Again in the portion of their brief under consideration, claimants on page 6 state that they were "three or four feet from the towing hawser", whereas claimant Carlsen's own admission placed him as *two* or *three* feet from the hawser (Carlsen, 325), and claimants' witness Reid placed claimant Sauder as "sitting underneath the tow line" which was "swinging either over Sauder's head or behind his head, but a few inches away" (Reid, 388).

The statement of the character of claimants' injuries, on page 6 of their brief, while in the record, is not properly to be considered here, because under the established practice in limitation proceedings, such facts would be for the determination of the Commissioner upon the proof of claims (loss) in case of a reference.

Benedict on Admiralty (4th Ed.), Sec. 551, p. 378.

Notwithstanding the clearly established and undisputed fact that claimants were transported without compensation either from them or their employer, Healy-Tibbitts Construction Company, and that their transportation was not by virtue of any contractual obligation of any character, claimants in the stating portion of their brief (pages 8 and 9) advance the argument that they were "passengers". They attempt to support this contention by citation

to the English Shipping Act and a headnote from *The New World,* 16 How. 467, 14 L. Ed. 1019, which headnote does not accurately state the holding of the Supreme Court in the case.

In *The New World, supra,* libellant claimed compensation for injuries sustained from a boiler explosion aboard a steamboat on the Sacramento River. The following portion of the opinion of the court shows the particular circumstances of that case:

> "The evidence shows that it is customary for the masters of steamboats to permit persons whose usual employment is on board of such boats, to go from place to place free of charge; that the appellee had formerly been employed as a waiter on board of this boat; and just before she sailed from Sacramento he applied to the master for a free passage to San Francisco, which was granted to him, and he came on board."

The basis of the opinion clearly appears to be an established custom. Continuing from the opinion:

> "It is proved that the custom thus to receive steamboat men is general. The owners must therefore be taken to have known it, and to have acquiesced in it, inasmuch as they did not forbid the master to conform to it. And the fair presumption is that the custom is one beneficial to themselves. Any privilege generally accorded to persons in a particular employment tends to render that employment more desirable, and of course, to enable the employer more easily and cheaply to obtain men to supply his wants."

Again:

> "But different employments may and do have different usages, and consequently, confer on the master different powers. And when, as in this case, a usage appears to be general, not unreasonable in itself, and indirectly beneficial to the owner, we are of opinion that the master has power to act under it and bind the owner".
>
> "The appellee must be deemed to have been lawfully on board under this general custom".
>
> "Whether precisely the same obligation in all respects on the part of the master and owners and their boats existed in his case, as in that of an ordinary passenger paying fare, we do not find it necessary to determine".

It is patent that upon no construction of the holding in *"The New World"* can claimants be held to have been passengers on the "Three Sisters".

It is not not necessary to go to any law outside that of our own Federal courts to find the rule of decision fixing the status of claimants aboard the "Three Sisters" as that of non-possengers.

In *The Downer,* 171 Fed. 571 (D. C. N. Y.), a ship carpenter employed on a steamer, while being taken by a tug to New York after the completion of his work on the steamer, was injured. The court there in passing upon the contention that the carpenter was a "passenger", said:

> "The theory on the part of the libellant is that being a passenger, he was entitled to all the care that a passenger is ordinarily entitled to. The difficulty with that contention is that the relation of passenger and carrier has not been established. If the libellant had remained

on the Georgic and received injuries there, it would scarcely be urged that he had a passenger's right. He was an employe of the White Star Line, which furnished him with an ordinarily safe place to work and when he was transferred to the Downer, he was still such an employe and was being transported from his work back to New York, also in an ordinarily safe place.

It is said in 5 *Cyc.* 486 that:

'A passenger, in the legal sense of the term, is one who travels in some public conveyance by virtue of a contract, express or implied, with the carrier, as to payment of fare, or that which is accepted as an equivalent therefor.'

There was no suggestion here of a contract of any description to pay a fare of any kind to the tug for the transportation. The tug's general business was that of towage, or work of that character. She was hired by the hour to perform such service of the kind as the White Star Company might require and in the course of this employment, she was directed to transport the libellant and his fellow workmen from the Georgic to the pier. There was no contractual relation between the libellant and the tug. The only contract in which the tug entered was the one mentioned, under which she was directed by her employer to transfer the men to the pier. It seems quite evident that the libellant was not entitled to the care which should be given to passengers."

In *The Vueltabajo*, 163 Fed. 594 (S. D. Ala. 1908), in holding that an employee of the owner of a vessel who was being transported to the place where he was to work was not a passenger said:

> "A 'passenger' is one who travels in a public conveyance by virtue of a contract, express or implied, with the carrier, as a payment of fare or something accepted as an equivalent therefor. Black's Law Dict. title 'passenger'; 5 Am. & Eng. Encyc. of Law (22nd Ed.), 486; Thompson on Car., p. 26; Pa. R. Co. v. Price, 96 Pa. 267. While libellant was a passenger, in the sense that he was a traveler being carried from one place to another he was not a passenger, in the legal sense of the term, and entitled to all the accommodations, rights, and privileges as such. He was not being carried by the steamer by any contractual relations with her as a common carrier."

Aside from the English Merchant Shipping Act and the misleading headnote above considered, claimants cite under a "See also" heading, three cases whose lack of application to the question is so patent that no extended comment on them is necessary.

1. *Re Calif. Nav. & Imp. Co.*, 110 Fed. 670 (N. D. Calif.), was a case of injury to a person traveling on a *common carrier* upon a *free pass.*

2. *Steam Dredge No. 1,* 122 Fed. 679, involved an injury to a government inspector whose duties *required* him to be aboard.

3. *The Wasco,* 53 Fed. 546, arose from an injury by a *common carrier,* to a passenger who had *paid a fare* for part of his journey but who continued on past his destination under the implied obligation to pay his fare arising from the customary cash collection in such cases.

It is submitted that the employees of Healey-Tibbitts Construction Co. (including claimants) who were as a matter of accommodation being transported from Point Reyes to San Francisco after the completion of their work, without any consideration moving to petitioner either from them or their employer, were not passengers.

II. ARGUMENT.

Owing to the nature of this proceeding there are two issues here presented, i. e., the issue of fault and the issue of limitation.

A. THE ISSUE OF FAULT.

I. Negligence.

(a) The Burden of Proving Negligence Is Upon Claimants.

The 84-H, 296 Fed. 427;
Benedict on Admiralty (4th Ed.), Sec. 526, p. 355.

(b) Petitioner Was Not Negligent.

Let us see what duty the vessel, her owner and master owed to the claimants.

If the claimants came aboard at the express or implied invitation of the petitioner or the master, the measure of our duty was the *exercise of ordinary care.* But if, on the other hand, the claimants came aboard upon their own insistence, and could be held to be mere licensees, we were only bound to *refrain from wilfully and wantonly injuring them.*

> "As a general rule those in charge of a vessel are bound to exercise ordinary care to avoid injuring persons who are rightfully on or about the vessel by express or implied invitation, and hence the vessel and her owners are liable for injuries caused to persons, who are on the vessel by express or implied invitation, by reason of their negligence or of that of the master or the crew, as by dangerous or defective conditions or appliances; but they do not owe such duty to trespassers or mere licensees, as such persons enter upon the vessel at their own risk, and the vessel is bound to refrain only from wilfully and wantonly injuring them."
>
> 36 *Cyc.* 172.

It is not contended by claimants that petitioner wilfully or wantonly injured them, so that if under the evidence claimants are held to be mere licensees they are without a remedy.

Claimants allege in their answers to the petition that their injuries resulted from *one specific act of negligence,* to-wit, the use by petitioner of an "unsound, rotten and defective" tow-rope and bridle, and at the trial claimants directed the greater part of their efforts to the proof of that *one specific act.* Now, in argument, they point out other claimed acts of negligence on the part of petitioner (such other acts, however, not being within the issues framed by the pleadings) and insist that because of such other acts of negligence petitioner is liable.

We are aware of the rule in Courts of Admiralty regarding variance and departure in pleading. Although we believe that the charged acts of negli-

gence other than those upon which issue is joined in the pleadings cannot be relied upon here by claimants even under the liberal rule of decision announced in the cases of *Dupont v. Vance,* 19 How. 162, 15 L. Ed. 584, and *The Gazelle,* 128 U. S. 474, 32 L. Ed. 496; nevertheless, the proof in the record is so palpably insufficient to establish these non-pleaded acts of negligence that we are meeting claimants' contention regarding them with full confidence that the question of whether or not they may be properly considered under the state of the pleadings will never arise.

We will first consider the evidence in the record as to *the one specific act of negligence pleaded by claimants,* and then consider the "divers" other claimed acts of negligence outside the allegations of claimants' answers.

Claimants alleged, and sought primarily to prove upon the trial, that the petitioner used a rotten, unsound and defective tow-line and bridle. For the purpose of analysis, we will separately consider the evidence as to the condition of the tow-line and the evidence as to the condition of the bridle.

We submit that there is no evidence in the record to sustain claimants' contention that the tow-line was "rotten, unsound and defective." The only evidence adduced by claimants tending to show any characteristics of the hawser used was the testimony of claimant Carlsen and claimants' witnesses Haney, Reid and Evans (members of the pile-driver

crew of which Carlsen was foreman) as to the length of the line from the mast of the "Three Sisters" to the barge under tow. This testimony purports to establish the length of the tow-line out during the tow, but there is no evidence that the line was either rotten, unsound or defective. The fact that this line did not break on either the upgoing or return voyage establishes its sound character beyond question. It is contended by claimants that the length of the line, as fixed by the conjectures of the pile-driver men aboard, shows the line to have been "too short" (Appellant's Brief, p. 71). An examination of claimants' evidence on this point shows it to be of a most untrustworthy character.

Claimant Carlsen, with the assistance of a leading question from his counsel, fixed "the distance between the barge and the tugboat, including the bridle and the rope" at 180 feet.

The following testimony of claimant Carlsen shows that he never in fact observed the distance between the tug and the tow:

"Q. Was the barge sheering from side to side?

A. I did not take any notice of that.

Q. You did not take any notice of that?

A. No.

Q. You did not notice the barge at all?

A. Not after he got outside with it. no. I left all that to the Captain" (324).

Carlsen's testimony was of such an unreliable character throughout that his manner of testifying

can readily be visualized from certain incidents in his testimony which will now be considered.

His testimony as a whole shows him to be a very keen minded witness, ready with his answers, and free with such voluntary statements as to his mind would color his testimony favorably. He detailed on the stand not only what claimants urge as the *res gestae* facts here, but supplied minor incidents, particulars and measurements in his testimony in a remarkable although not in a convincing way.

He testified that the Captain came aft, sat on the hatch and cleaned some fish, and that at that time Scotty Evans was steering the boat (295).

The following is his testimony on this point on cross-examination:

"Q. Did someone tell you that Scotty Evans had steered the boat for a while?

A. No.

Q. Or did you see him yourself?

A. I seen him myself. I seen him in the pilot house myself.

Q. Where were you when you saw him in the pilot house?

A. I was back of the starboard side, back of the engine house some place.

Q. *And you mean to tell us that you could tell that he was steering or had his hand on that wheel?*

A. *Absolutely.*

Q. You were flat on the deck, were you?

A. How is that?

Q. You were standing on the deck were you?

A. Yes, sir.

Q. Do you remember that the galley is between the after-part of the pilot house and the wheel house?

A. Yes, sir.

Q. And you think that that wheel is in a position where you could see from the deck by the engine house?

A. Yes, sir'' (333, 334).

This testimony is proven untrue by the physical impossibility of Carlsen seeing the wheel where the galley completely obstructed his view, and this fact could not escape the observation of Judge Partridge upon his inspection of the vessel. The impossibility of his seeing the wheel from any position aft of the house is plainly shown by the other evidence in the record, not to mention Carlsen's own admission as to the position of the galley, contained in the foregoing testimony.

Again, Carlsen testified that while at a point back of the engine house he saw ''one fellow in the galley shaving himself'' and ''over the sink wherever that was.'' But when his attention was directed to the impossibility of his seeing the man shaving before the mirror in the galley he volunteered the astounding information that the man had a hand-mirror in his hand (309, 310). Then he testified:

''Q. So you saw him with a hand-mirror in his hand in the galley, and you saw that from where you were in the rear, did you?

A. I did.

Q. And you are sure of that are you?

A. Yes, I was standing up at that time'' (310).

To see a man shaving in the galley either before the large mirror in the galley on the port side, or at any place in the galley with the readily invented "hand-mirror", Carlsen would have had to have seen him through the after wall of the galley, as well as through seven to ten mattresses piled on top of the skylight of the engine room (Carlsen 307, Haney 260, 261, Kruger 86, 87, Carlsen 274).

Notwithstanding the particularity of Carlsen's testimony otherwise, he persistently maintained throughout the trial that he did not remember anything about playing cards (277, 306, 326, 327) although he pointed out to the court at the time when testimony was taken aboard ship the exact position where each of the four card players sat (276, 277).

Claimants' witness Owen Haney, testified that the greatest distance that separated the tug and tow was 200 feet "at the outside" (255), but his testimony is to be viewed as that of a man testifying for two injured members of his own crew, and his estimate was obviously no more than a mere guess arrived at after discussing the question with claimant's other witnesses (259).

The testimony of claimants' witness George Reid on the question of the distance between the tug and the tow, is in part as follows:

> "Q. Did you notice the distance that separated the barge from the 'Three Sisters' at any time during this journey?

A. Well that is pretty hard for me to say.

Q. Did you notice the distance, did you notice the barge at any time, did you look back toward the barge?

A. Every once in a while, yes, we would give her the once over, when she bounced around.

Q. What would you say was the extreme distance at any time that separated the barge from the 'Three Sisters', just give us your best estimate?

A. Well, I do not know; I am a poor estimator. It might be 150 feet, it might be 175 feet, for all I know" (368).

At this point Mr. Heidelberg for claimants, over the objection of petitioner, put the following leading question to the witness:

"Q. You would say that the extreme distance was not to exceed 175 feet, in your opinion?" (369).

to which the witness gave the following worthless answer, which becomes significant when we consider the various estimates of the other pile-driver men:

"A. Well, that is pretty hard to say, *some say 175, some say 200, some say 180.* I was just giving you my estimate about it. I would not say 'Yes', and I would not say 'No' " (369).

Claimants' witness Philip Evans, testified in response to a question from the court as to the length of the line out, as follows:

"Somewhere close on to 200, as near as I can judge; there maybe a little more or a little less, *I don't know*" (343).

Opposed to this purely conjectural testimony adduced by claimants we have:

1. The testimony of Captain Kruger that the line out was from 450 to 500 feet long (93, 94).

2. The testimony of deck-hand Anderson (an able seaman) that the line was about 400 feet long (167).

3. The testimony of port engineer Davis that the hawser put aboard the "Three Sisters" was between 500 and 600 feet in length (179) and was the same hawser that was used to tow the barge up to Point Reyes, and

4. The testimony of former port engineer Carlton that the hawser used on the up-going voyage was between 90 and 100 fathoms in length (353).

We have the further and uncontradicted fact to consider, that the entire identical towing rig (hawser and bridle) used on the return voyage was employed in towing the same barge up to Point Reyes in a heavy sea, with two tugs pulling upon the rig part of the way, some thirty days before the accident (78, 79, 80, 81).

The testimony on behalf of claimants as to the condition of the bridle may be summarized as follows:

Claimants' witness Urquhart, testified that the wire cable in the bridle was rusty and that the swivel was frozen with rust (46 and fol.). On cross-examination he testified that such was the condition of the bridle before the up-going voyage at pier No. 46 (48, 49).

Inasmuch as Urquhart, on the taking of his deposition over four months before the trial, testified to conditions of the sea at the time of the accident (50, 51) which were not only disproved by claimants' witnesses Haney (262, 263) and Reid (376) but which were proven impossible of existence under the conditions of course, wind and wave established without material dispute at the trial (97, 98, 397, 169); and inasmuch as his testimony as to the condition of the swivel of the bridle is inherently improbable in view of its mechanical construction (Claimants' Ex. A) and the actual successful use of the bridle in making other tows after his first claimed examination (78, 79, 80, 81, 105, 112), it requires no argument to justify the action of the District Court in ignoring his testimony. *It is difficult indeed to believe any of the testimony of Urquhart when it is remembered that he testified that water was coming aboard the "Three Sisters" by the bow when she was on a course East by South, Half South, with the wind and sea on her starboard quarter.*

Claimants' witness Reid (one of the card players) testified that the bridle was rusty and that there were a few broken strands in the bridle "where it was made fast to the shackle there" (366), but when required on cross-examination to point on the specific portion of the bridle where the strands were broken, indicated a spot where claimants' evidence itself shows that the line did not part. Inasmuch as

claimants argue that the trial court misapprehended the facts of the testimony on this point (Claimants' Brief, p. 48), we are setting forth Reid's conflicting testimony at length:

> "Mr. LILLICK. Q. Mr. Reid, when you testified the other day in commenting upon the strands that you said were broken, you said there were a few around there where it was made fast to the shackle, there, or whatever it is. What did you mean by that, what portion of the bridle?
>
> A. Up a little ways from the splice, there.
>
> Q. Do you mean near the swivel?
>
> A. No, up this way, up around in here.
>
> Q. So it was some distance back of the splice that was nearest the swivel?
>
> A. Yes.
>
> The COURT. Q. *But that is not where it broke, at all, was it? I think the evidence is that one of the breaks was a very short distance from the thimble and the other one was back nearer the bitt*" (380, 381).

It should be borne in mind that in giving the above testimony the witness was illustrating his statements by reference to a towing bridle which was in court before him.

In order to settle any argument about the court not fully understanding the evidence on this point, we are setting forth the testimony of claimants' witness Haney as to where the breaks occurred:

> "Q. Where did the bridle break?
>
> A. One of them broke at the thimble and the other broke at the other extreme end, where she goes over the bitt.
>
> The COURT. Q. *Do you mean at the bitt?*

A. Yes; one broke at the thimble and the other broke at the other extreme end, where she goes over at the bitt" (258).

It is apparent that Reid never in fact observed any broken strands in the bridle, and that his testimony as to observation of broken strands is a rank invention, for on the first question asked him on cross-examination he absolutely contradicted himself as to where the broken strands were located.

"Mr. LILLICK. Q. When you saw the strands of the bridle broken, were the strands that you saw that were broken near the loop that went over the bitt?

A. Well, no, just the end of the splice, the end of the splice that went over the bitt.

The COURT. Q. *Do you mean the end of the thimble?*

A. No, the end of the splice, your Honor, right here" (371).

To make his testimony further incomprehensible, Reid proceeded to give his idea of where the breaks actually occurred:

"Q. Where was it broken?

A. About a foot or so from the swivel, there, and about, well, I would not say whether it was 2 feet or a dozen feet, or a million feet, or at all, but it was broke somewhere near the eye of the other bitt. I do not know whether it was on the starboard side or the port-side, but it was on one side" (372).

Then came the following:

"Q. How long was the bridle on each side after it was broken, giving your measurement from the side to which it was attached?

A. That is pretty hard to say, too, *it might be about six feet, and it might be ten feet;* I could not tell you, though.

Q. That is one side; on the other side how far would you say?

A. *Probably five feet"* (372, 373).

In this connection it should be borne in mind that the entire length of the bridle was about 70 feet, each leg being approximately 35 feet in length (150, 179).

The foregoing is the evidence on which claimants asked the District Court to find that petitioner used a "rotten, unsound and defective" bridle. It is submitted that it did not even constitute a believable prima facie showing, much less did it furnish a basis for sustaining the burden of proof of petitioner's alleged negligence.

In opposition to this showing we have the following evidence:

First, the testimony of former port engineer Carlton that the bridle on the up-going voyage was in good condition, with the swivel turning freely (354, 355).

Second, the testimony of port engineer Davis that when the vessel went up to Point Reyes to bring back the barge the bridle was in good condition and the swivel was turning freely (179, 180, 187, 193, 194, 195, 199).

Third, the type of construction and the mechanical operation of the swivel showed it to have a

free pin with two bearing surfaces, both of which must rust to make it incapable of turning freely (Figari 157, 158, 159, 249, 250, Westman 150, 151).

Fourth, the testimony of Walter Westman, superintendent of the ship yard of Crowley Launch & Tugboat Company, that he had never seen one of Crowley's swivels frozen with rust (150).

Fifth, the fact that the bridle was used under severe conditions on the up-going voyage (two tugs pulled upon it part of the way) and on one tow made between the up voyage and the down voyage (Kruger 78, 79, 80, 81, 105, 112).

Sixth, the circumstances that bridles of this character are exclusive equipment with Crowley Launch & Tugboat Company (Westman 150).

Seventh, the fact that they were used by Crowley's for both outside and inside towing (Westman 152).

Eighth, the fact tht Captain Mohr had used bridles of this type in making similar tows (Mohr 394 and 395).

Ninth, the fact that the bridle was taken from one of the large boats of Crowley's and had been in service up to the time it was taken (Figari 157 and 248).

Tenth, the fact that the entire towing apparatus employed on the voyage was pronounced safe and proper by the only expert called (Mohr 395, 396 and 397).

Claimants devote over ten pages of their brief to argument in support of their contention that port engineer Davis did not in fact examine the bridle and swivel before the "Three Sisters" went to Point Reyes to bring back the barge. Claimants urge that Davis' testimony was based upon inference and not actual recollection. This contention is untenable in view of the unequivocal and repeated statements of the witness that he did in fact make the inspection in question.

In the first place, it should be borne in mind that the initial statement made by Davis as to his inspection of the swivel was made in response to a question from the court:

> "The COURT. Did you examine the swivel?
> A. Yes, sir, that is part of my duty.
> Q. Was the swivel moved?
> A. Yes, sir.
> Q. It was not frozen in any way?
> A. No, sir. If it was I would have noticed it" (179, 180).

The cross-examination of Davis opened with an attempt on the part of claimants to discredit the witness by confusing him on various dates of occurrences happening over a year before he took the stand. A greater part of the criticism of the testimony of Davis set forth in claimants' brief is directed toward what Davis was unable to remember in point of time. It is submitted, that inasmuch as it is only an exceptionally mentally gifted man who is able to place dates after the lapse of a year with

any degree of accuracy, that the circumstance that Davis was unable to supply specific dates is a circumstance which, of itself, should point to the absolute integrity of his testimony. The manner of cross-examination of Davis indulged in constantly by claimants' proctor is well illustrated by the following excerpt from the cross-examination:

> "Q. You do not remember the date when you entered the employ of A. Paladini, Inc.?
> A. I do not.
> Q. Yet you remember you made a thorough inspection of the tow line and the bridle used in this particular voyage?
> A. Yes, sir.
> Q. You do?
> A. Yes, sir" (186, 187).

The manifest unfairness in the manner of cross-examination was apparently recognized by the court when the following question was asked:

> "Q. Don't you remember that you never saw this swivel before January 8, 1923?
> The COURT. I think he might be confused about the dates, there. Let me put the question to him in this way:
> Q. You remember the day the accident happened, that is, you remember that an accident happened, don't you?
> A. Yes.
> Q. The 'Three Sisters' came back to port with two wounded men?
> A. Yes.
> Q. A few days before that you testified that you sent the 'Three Sisters' up to bring back the barge?
> A. Yes.

Q. Did you examine the bridle just before she went up on that last trip to bring back the barge?

A. Yes, sir.

Mr. HEIDELBERG. Q. You know you did that and yet you don't know when you became Port Engineer for A. Paladini & Company; you don't know that, do you?

A. The exact date, no" (197, 198).

The court not only had an opportunity to closely observe Davis' manner of testifying in response to questions from counsel, but the court addressed several questions to the witness personally.

In his opinion in this case Judge Partridge said:

"The evidence in regard to the condition of the bridle and the length of the hawser is conflicting. I am satisfied, however, that the bridle was subjected to a proper inspection" (474).

Surely after Judge Partridge personally heard the testimony of claimants' witness Reid, the deposition of claimants' witness Urquhart, and the opposing testimony of Davis as to the condition of the bridle, and after he decided on this conflict in favor of the testimony of Davis, this court cannot be seriously asked to reverse the District Court in this respect.

With deference, we submit that the following reasoning of the Supreme Court in the case of *The Steam Tug Quickstep,* 9 Wall. 665, 19 L. Ed. 767, should be controlling here:

"The Court that can see the witnesses, hear their statements, observe their demeanor, and

> compare their degree of intelligence, is better able than an appellate tribunal to reconcile differences in testimony, or if that be not possible, to ascertain the real nature of the transaction."

We would also refer to the case of *Monongahela River, etc. Co. v. Schinnerer,* 196 Fed. 375 (C. C. A. 6, 1912), where in the opinion of the court is found the following:

> "There is, however, a sharp conflict as to the facts alleged to constitute respondent's negligence; and although we here consider the testimony de novo, we do this in recognition of the rule stated by Judge (now Mr. Justice) Lurton, in City of Cleveland v. Chisholm, 90 Fed. 431, 434, 33 C. C. A. 157, 160, that:
>
> 'The judgment of the District Court will not be reversed when the result depends alone upon questions of fact depending upon conflicting evidence, unless there is a decided preponderance against the judgment, where the trial judge saw and heard the witnesses, and had an opportunity of weighing their intelligence and candor.' "

In seeking to reverse the findings of the District Court on the question of the inspection of the bridle, claimants are asking this court to accept the testimony of Urquhart, a witness whose testimony, as has heretofore been pointed out, is not only inherently improbable but totally unbelievable in view of the proven falsity of a material portion of his testimony. There is no question but that it must either be decided that Davis was correct when he said the swivel was turning freely or Urquhart was right when he said that it was frozen with rust.

We will now consider briefly the acts of negligence charged by claimants but which are not pleaded in their answers. Replying to the specifications of negligence set forth on pages 70, 71 and 72 of claimants' brief:

(a) It is true that "neither Master nor deckhand of the 'Three Sisters' ever inspected the towing equipment". Petitioner had delegated that duty of inspection to its Port Engineer, who, according to his testimony and the decision of the District Court, made the proper inspection.

(b) It is admitted that "no one inspected the towing equipment at Point Reyes before the commencement of the voyage on which the injuries were sustained." The inspection was made at the home port of San Francisco immediately before the "Three Sisters" left to bring the barge back, which inspection is certainly reasonably sufficient when one considers the relatively short distance from the home port to Point Reyes.

(c) It is *not true* "that no one inspected the towing equipment before the commencement of the voyage to Point Reyes." If this assignment refers to the up voyage in May, 1923, it is immaterial, because the towing equipment was proven sufficient by the success of that voyage under severe conditions in a heavy sea. If this assignment refers to the voyage when the "Three Sisters" went up to get the barge, it is answered by our reply to (b) *supra.*

(d) The Master *did* manipulate his engines to keep the tow safe. He had a new engine which could not be run at full speed (Kruger 124), and which he slowed down to half speed when the "Three Sisters" encountered the ground swells (Kruger 99, 124).

(e) The Master of the "Three Sisters" did not tow with too short a tow-line (see pages 11 to 17, inclusive, of this brief).

(f) Port Engineer Carlton's competency is not at issue here. Port Engineer Davis, who was the Port Engineer of petitioner for some time prior to and at the time of the accident, was competent. There is nothing in the record showing him to be incompetent. He was a licensed man (463, 464, 465, 466), and had wide experience as his testimony satisfactorily shows (177, 186, 187, 188, 189). Captain Kruger was a competent master of the "Three Sisters". He was thirty-one years of age at the time of the trial (69), had been on the water since he was fourteen years old (70), was licensed as a launch operator in 1917 (70), and had had continuous experience from 1917 to the time of the accident as master of various craft similar to the "Three Sisters", plying upon the Pacific Ocean (71, 72, 73). He had had adequate towing experience upon, and was fully familiar with, the waters where the accident occurred (72, 73). Deckhand Anderson was more than competent to fill the position of deckhand upon a launch such as the "Three

Sisters''. He was an able seaman (170), had been at sea seven years (174), had been on transports, oil tankers and gasoline schooners, and had been quartermaster on the ''Madrona'' and the ''Nevada'' and had taken his turn at the wheel (174).

(g) The Master of the ''Three Sisters'' *was not negligent* in failing to *order* injured claimants away from the hawser and not *enforcing such order.* These claimants were not passengers. Claimant Carlsen had been a sailor for four or five years. Claimant Sauder was a pile-driver man. Neither could be properly termed landsmen. The Captain *warned* them to keep clear of the line. Considering claimants' status aboard, that was certainly sufficient, as petitioner was only legally bound to refrain from wilfully or wantonly injuring them, or at most, to exercise ordinary care and diligence in conducting the towing operation while they were aboard. The cases cited by claimants on this point are all *passenger cases* except *The Steam Dredge No. 1,* 122 Fed. 685, which was a case of a government inspector injured by a risk *not fully within his knoweldge* where the vessel had the *last clear chance* to avoid the accident.

Claimants urged in the District Court and now contend, that because petitioner was not able to produce the swivel with the two broken pieces of cable upon claimants' demand at the trial over a year after the accident, that an unfavorable inference should be made against petitioner. This contention is based only upon the circumstance that in a visit

by claimants' proctor Mr. McShane upon his old acquaintance, Alexander Paladini, Mr. McShane testified that he asked Mr. Paladini "what he was going to do with reference to these men". Mr. McShane admitted that he did not tell Mr. Paladini that he was going to commence suit and that the conversation after his inquiry became purely social (McShane 433, 434). In view of the fact that workmen's compensation was secured for the injured men and the presence of the insurer here as a claimant, we submit, without any reflection upon the testimony of Mr. McShane, that Mr. Paladini's testimony as to Mr. McShane's visit is entirely reasonable (Paladini, 240, 426, 427, 428, 429, 430). The claimed inference was not drawn by the District Court for the obvious reason that there was nothing in the evidence to support it.

We respectfully submit that as claimants failed to prove that petitioner was in anywise negligent in using the line and bridle employed on the voyage, and as there was consequently no liability on the part of petitioner to limit, that the decree of the District Court denying liability *in toto* was the only decree that could be properly entered under the evidence, and that it should not be disturbed.

(c) The Rule of Res Ipsa Loquitur.

Claimants, having failed at the trial in proving the negligence specifically charged in their answers now say, in effect, "Well, at any rate, the thing speaks for itself" *(res ipsa loquitur)*. Having failed

to sustain their burden of proof by any reliable quantum, much less a preponderance, of the evidence, claimants now fall back upon the weakest makeshift in the law as a substitute for proof—the presumption of fault from the circumstances of the mishap, the doctrine of *res ipsa loquitur.*

To sustain claimants' position they cite in their brief a great many cases. Some of them are true applications of the rule of *res ipsa loquitur.* Some illustrate the doctrine of inevitable accident. But the cases illustrating the doctrines of *res ipsa loquitur* and inevitable accident, are mixed indiscriminately with cases involving unseaworthiness under contracts of charter, affreightment and of towage which are entirely unrelated to tort cases of the present character, and particularly unrelated to one with the peculiar facts of the case at bar.

For the present we will confine our attention to the consideration of the doctrine of *res ipsa loquitur.*

1. Statement of and Reason for the Rule of Res Ipsa Loquitur.

The Rambler, 290 Fed. 791 (C. C. A. 2-1923), was a case where a decree denying the right of limitation was reversed. The court there said, regarding the rule of *res ipsa loquitur,* that it had nothing to add to what is said in *Central Railroad Co. v. Peluso,* 286 Fed. 661. We therefore set forth here so much of the opinion in *Central Railroad Co. v. Peluso, supra,* as is pertinent to the present discussion:

> "At the outset, it is desirable to clear away some misapprehension of the meaning of res

ipsa loquitur, and this may best be done by quoting from the admirable statement of McLaughlin, J., in Francey v. Rutland R. R. Co., 222 N. Y. 482, 119 N. E. 86:

'The action was tried and submitted to the jury on an erroneous theory as to the application of the rule of res ipsa loquitur. It is not a complicated rule, nor is there difficulty in applying it in a given case, when the reason for its adoption is understood. The phrase usually employed to express the rule, res ipsa loquitur—the thing speaks for itself—may at times tend to obscure rather than to make clear what the rule means. *All that is meant is that the circumstances involved in or connected with an accident are of such an unusual character as to justify, in the absence of any other evidence bearing upon the subject, the inference that the accident was due to the negligence of the one having possession or control of the article or thing which caused the injury.* This inference is not drawn merely because the thing speaks for itself, but because all of the circumstances surrounding the accident are of such a character that unless an explanation be given the only fair and reasonable conclusion is that the accident was due to some omission of defendant's duty.'

Again, as said by Mr. Justice Holmes in Southern Railway v. Bennett, 233 U. S. 80, 85, 34 Sup. Ct. 566, 567 (58 L. Ed. 860):

'Of course, the burden of proving negligence in a strict sense is on the plaintiff throughout, as was recognized and stated later in the charge. The phrase picked out for criticism did not controvert that proposition but merely expressed in an untechnical way that if the death was due to a defective instrumentality and no explanation was given, the plaintiff had sustained the burden. The instruction is criticized further as if the Judge had said res ipsa lo-

quitur—which would have been right or wrong according to the res referred to.'

As also said by Mr. Justice Pitney in Sweeney v. Erving, 228 U. S. 233, 238, 33 Sup. Ct. 416, 417 (57 L. Ed. 815, Ann. Cas. 1914D, 905):

'The general rule in actions of negligence is that the mere proof of an "accident" (using the word in the loose and popular sense) does not raise any presumption of negligence; but in the application of this rule, it is recognized that there is a class of cases where the circumstances of the occurrence that has caused the injury are of a character to give ground for a reasonable inference that if due care had been employed, by the party charged with care in the premises, the thing that happened amiss would not have happened. In such cases it is said, res ipsa loquitur—the thing speaks for itself—that is to say, if there is nothing to explain or rebut the inference that arises from the way in which the thing happened, it may fairly be found to have been occasioned by negligence.

The doctrine has been so often invoked to sustain the refusal by trial courts to nonsuit the plaintiff or direct the verdict in favor of the defendant, that the application of the rule, where it does apply, in raising a question for the jury, and thus making it incumbent upon the defendant to adduce proof if he desires to do so, has sometimes been erroneously confused with the question of the burden of proof.' "

We submit from the following that the rule requires the concurrence of two elements:

1. Exclusive control of all the instrumentalities of injury by the defendant.

2. Circumstances which allow *only* the conclusion of defendant's fault in the absence of an explanation.

Professor Wigmore says of the rule:

> "But the following considerations ought to limit it: (1) The apparatus must be such that in the ordinary instance no injurious operation is to be expected except from a careless construction, inspection or user; (2) Both inspection and user must have been at the time of the injury in the control of the party charged; (3) The injurious occurrence or condition must have happened irrespective of any voluntary action at the time by the party injured."

And as the *reason for the rule,* Wigmore states:

> "It may be added that the particular force and justice of the presumption, regarded as a rule throwing upon the party charged the duty of producing evidence, consist in the circumstance that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him but inaccessible to the injured person."
>
> *Wigmore on Evidence* (both editions), Sec. 2509.

This court pointed out in *The Great Northern,* 251 Fed. 826, at p. 829 of the Reporter, that the presumption does not arise from the fact of injury, but from *the circumstances of the happening.*

2. The Rule of Res Ipsa Loquitur Is Not Applicable.

In applying the rule of *res ipsa loquitur* to the case at bar we find that the first requisite of application, i. e., that of exclusive control, is admittedly present, but that the second indispensable element, viz., *circumstances which allow only the conclusion*

of fault in the absence of an explanation, is totally lacking.

Let us set forth those circumstances of the accident which "speak" of its character:

1. *The Vessel*—"Three Sisters", 135 H. P. Deisel Launch—length 56.3/10 ft., breadth 15.6/10 ft., depth 6 ft.

2. *Her Crew*—A licensed Launch Captain of experience, and a deck-hand who was an able seaman.

3. *The Voyage*—From Point Reyes to San Francisco, under tow.

4. *The Tow*—Crowley's Barge No. 61 with a pile driver aboard.

5. *The Towing Equipment*—A seven-inch Manila hawser and a 3/4 or 7/8 inch steel bridle of reasonably sufficient length and strength, duly inspected and previously tested.

6. *Course*—E x S 1/2 S.

7. *Wind and Wave*—(a) Wind: Very light northwester, astern. (b) Wave: Heavy westerly swells on the starboard quarter.

As the character of the ground swells is the most important determination controlling the question of whether or not the circumstances of the accident point *only to negligence of petitioner as the cause,* we will now set forth such portions of the testimony of the various witnesses as throw light on this condition of the sea:

"After getting under way there was quite a swell on" (Urquhart, 45).

"On that occasion there was quite a swell running" (Urquhart, 49).

"I was getting some ground swells and the further we got the bigger the ground swells got" (Kruger, 96).

"When she was going ahead, part of the time the line would be in the water, and sometimes it would jump right out as it was running with the sea" (Kruger, 98).

"When we got heavy into ground swells, I slowed down into half speed" (Kruger, 99).

"Q. During all of that time did you ship any water, Captain?

A. No, sir.

The COURT. Q. Where was the wind?

A. A very light northwester. It was right astern of us. There was no choppy sea at all. There was just an ordinary heavy ground swell" (Kruger, 104).

"The COURT. Q. Captain, what was your course coming down?

A. East by South, half South.

Q. And what direction were those swells?

A. We call them westerly swells.

Q. How would they catch you?

A. About on the quarter" (Kruger, 175).

"Q. The vessel did not roll, then, in those swells?

A. She jumped, but it did not roll.

Q. What was the jumping from?

A. They always do in a ground swell" (Haney, 267).

"Q. There was a swell, wasn't there?

A. Yes, there was a swell coming down.

Q. There was a heavy swell, wasn't there?

A. I don't know what you would call a heavy swell out there.

Q. What do you call a heavy swell, as a sailor man?

A. I have seen some awfully heavy swells. *We had a pretty good swell for a small boat I should judge"* (Carlsen, 323, 324).

"Q. So that it was perfectly smooth and a steady pull?

A. No, sir, it was not perfectly smooth. There was *quite a good ground swell out there.* The boat was going like that, as any boat will. I did not notice any particular jerk at any time though" (Carlsen, 333).

"Q. * * * Did you look back toward the barge?

A. Every once in a while we would give her the once over *when she bounced around"* (Reid, 368).

Under the foregoing condition the accident occurred. Captain Kruger's explanation of the reason for the parting of the bridle follows:

"Q. What is the explanation, if you have any, of the reason for the bridle parting?

A. Well, the way I could explain it is that the barge was at times swinging from one side to the other and going with the sea, and sometimes my boat would go ahead, the 'Three Sisters', and jerk the line when it got between the seas and running with the sea" (98).

Certainly the foregoing circumstances do not indicate "The vessel alone was at fault" or "the bridle parted without any apparent reason" or "when upon a smooth sea under favorable conditions the towing equipment broke", since the evidence shows that the swells were so severe that this small boat slowed down to half speed and even then would run with the sea, jump and jerk the line attached to the barge, which was sheering and

bouncing around. The circumstances of this accident plainly bespeak the force of swells of such a severity that even the action of the Master in slowing down to half speed could not avoid the effect of the sea which swerved the barge from side to side and caused the tug to run and jump with the sea and bring up the line with a jerk. The circumstances of this accident show that this force of the sea caused the breaking of the bridle, as found by the District Court. We respectfully submit that far from "speaking for itself" and indicating that "the circumstances point *only to the vessel's negligence,*" as contended by claimants, this mishap is not only silent as far as establishing *prima facie* negligence is concerned but establishes that the vessel encountered what for a ship of its size was a condition of the sea too forceful to be thwarted by the use of ordinarily reasonable and proper towing equipment and proper navigation.

Captain Mohr, a tow master of experience, testified as follows:

> "Q. Captain, under what circumstances does reasonably proper and safe towing equipment break?
>
> A. *By cross seas, or by a tow, or a launch, or a tug, being in different positions, such as the barge being up in one sea and the tug being down in the other*" (397, 398).

At that point the following related question was propounded by petitioner's proctor:

> "Q. Is it, or is it not the fact that the best and safest possible equipment breaks under such circumstances as you have mentioned?"

Upon the court indicating that the question called for "a matter of pure common sense" and "that the court has sense enough to see that there will be an additional strain if the tow is going down one side of the swell and the tug is coming up on the other side", petitioner's proctor withdrew the question.

Regarding the cases cited by claimants on the doctrine under discussion, we feel, in view of the nature of the rule and its application, as heretofore outlined, that any specific cases saying "negligence will be presumed from the breaking of the hawser" or like expressions, are worthless, inasmuch as each particular case must "speak for itself" according to its own particular facts, and such cases no more than state the admitted rule and apply it to different states of facts existing upon different waters. Such cases must be construed in the light of their peculiar states of facts and should not be considered here, where the question is "what do the particular circumstances of the instant accident say"? Surely it cannot be argued, because some court on the Atlantic seaboard held the breaking of a towing hawser under certain particular conditions of wind and wave upon particular waters, to be *"res ipsa loquitur"*, that, consequently, every broken towing hawser "speaks for

itself", no matter where or under what circumstances the break occurred. The cases cited by claimants merely reiterate the rule appearing in the foregoing authorities and, so considered, they are of some value to this court, but it is respectfully urged that such cases are not to be considered as establishing an arbitrary rule that every broken towing hawser is *res ipsa loquitur,* or as offering any rule for the application of the doctrine in the present case.

We submit from the foregoing that the accident was not *"res ipsa loquitur"* because wholly lacking in the essential element of its circumstances pointing only to negligence as a cause.

By way of analogy, in application of the rule, we cite the leading case of *Duhme v. Hamburg American Packet Company,* 184 N. Y. 404, 77 N. E. 386, 112 Am. St. Rep. 615. That case shows a state of facts somewhat similar to those in the case at bar. There the plaintiff while upon a dock was injured by the recoil of a hawser which parted while a steamer was being warped to its pier. The plaintiff relied upon the maxim of *res ipsa loquitur,* but the court held the maxim inapplicable, saying:

> "The parting of the hawser did not speak for itself, as imputing negligence to the defendant, and to leave it to jurors to say whether it was the result of negligence would be to invite them to speculate upon possibilities, without any basis in fact. The pier was a safe place had the plaintiff and his mother kept within its shelter and had they heeded the warnings of defend-

ant's servants. The breaking of the shackle was not shown to be due to any defect in its manufacture, or to the omission by any care in handling, and the circumstances disclosed simply permit the natural inference that it yielded to the tremendous strain put upon the hawser in bringing the vessel from the channel into its berth at the pier."

3. Claimants by Their Pleading and Proof in This Proceeding Are Precluded From Invoking the Rule of Res Ipsa Loquitur.

All consideration of the rule of *res ipsa loquitur* is rendered unnecessary here, as, even if the rule would ordinarily be applicable (although petitioner submits it is not so) the claimants have precluded themselves from its benefit by relying, both in *pleading* and *proof* upon *specifically* alleged negligence.

The law on this point is established by this court in *The Great Northern,* supra, where on page 829 of the reporter (251 Fed.), Judge Gilbert said:

> "Again, the general rule is that, where the plaintiff in an action for negligence specifically sets out in full in what the negligence of the defendant consisted, the doctrine of res ipsa loquitur has no application. *Midland Valley R. Co. v. Conner,* 217 Fed. 956, 133 C. C. A. 628, and cases there cited; *White v. Chicago G. W. R. Co.,* 246 Fed. 427, 158 C. C. A. 491."

The case of *Midland Valley R. Co. v. Conner* (C. C. A. 8th Cir. 1914) cited by Judge Gilbert, was an action against a railway for wrongful death of a passenger. The complaint contained five specific allegations of negligence, but no allegations of general negligence. The District

Court instructed the jury that the doctrine of *res ipsa loquitur* was applicable and raised a presumption of negligence on the part of the carrier. The Circuit Court of Appeals held the instruction erroneous basing its decision upon the ground that as the plaintiff pleaded *specific* negligence instead of general negligence the rule of *res ipsa loquitur* has no application. After citing numerous authorities to sustain this position, the court set forth the reason for the holding by saying:

> "'*Res ipsa loquitur*' means 'the thing speaks for itself.' The question is, what does it say? Does it say that from the accident the company has been negligent in every possible way, or does it say that the presumption is that in some way the company has been negligent? Of course, if the first is what it says, that is, the company has been negligent in every conceivable way, then the presumption is that it was negligent in the very way specifically alleged; but if the second is true, if the presumption is that in some way the company has been negligent, then there is no presumption of negligence in any particular way specified, and this is true although, where the presumption exists, the company must show that it was not negligent in any way. The rule that the evidence must correspond with the allegations is as old as the common law, and if the presumption is simply of some negligence that causes the injury, and not a negligence in all things, one who specified the negligence can find nothing in the presumption to sustain the allegation."

The last cited case was followed by the case of *White v. Chicago G. W. R. Co.,* (C. C. A. 8th Cir. 1917) 246 Fed. 427, where the court said:

> "The plaintiff in error claims in substance that the maxim '*res ipsa loquitur*' applies to this case. This might be true if the plaintiff had not set out in full in what the negligence of the defendant consisted, * * *.
>
> Under such circumstances, the maxim in question can have no application. *Midland Valley R. Co. v. Conner,* 217 Fed. 956, 133 C. C. A. 628."

The claimants here have pleaded and directed their proof to the establishment of the employment by petitioner of *"a rotten, unsound and defective" tow line and bridle.* Having done so they must *prove* the specific negligence alleged and the rule of *res ipsa loquitur,* which operates within very restricted limits in aid of a proponent of general negligence, can give them no assistance.

There can be no necessity to "let the thing speak for itself", where claimants have already spoken for it. We are not relying here alone upon such "speaking" as claimants did in their answers to preclude them from invoking the rule, but we are in fairness and reason asserting that, after claimants pleaded the use of "a rotten, unsound and defective" tow line and bridle and after they have "spoken" by the testimony of Carlsen, Evans, Reid, Urquhart, Haney and Woods in attempted establishment of the allegations of their answers, they cannot now say "yes, by pleading and proof we have spoken, but since the District Court did not believe us, let the thing speak for itself". The fact that claimants have "spoken" in vain does not alter

the situation. By speaking "for the thing" claimants have obviated the possibility of "the thing speaking for itself."

(d) Inevitable Accident.

Claimants contend that the doctrine of inevitable accident is applicable to the facts of this case, and that the District Court incorrectly applied that doctrine in its determination in this case. We earnestly urge that (a) the rule is not applicable and that the decree of the District Court is not necessarily based thereon; and (b) that if the rule be considered applicable and the remarks of the District Court in its oral opinion be considered an application of the rule, the rule has been *satisfied by the proofs* and the application (if there was such) by the District Court was correct.

1. Statement of the Doctrine.

In the many cases cited by claimants on this doctrine it appears that the doctrine is peculiarly one of maritime law; that it originally applied only in collision cases but that it has been extended to cover contract and tort cases generally.

Limitations of time and space will not permit us to consider case by case the multitude of cases cited on the doctrine of inevitable accident. We will attempt here only to set forth what we believe to be a fair statement of the doctrine of inevitable accident in view of claimants' cited authorities and to dem-

onstrate that the argument of claimants as to the application of the doctrine is unfounded.

We believe the following to be a statement including the elements of the doctrine of inevitable accident:

> "(1) Where in a maritime cause,
> (2) Negligence is charged of a vessel or her owner,
> (3) in respect of her seaworthiness or proper navigation, and
> (4) the injured party has sustained the burden of proof of negligence either by (a) the production of evidence or (b) proof of circumstances from which the inference of negligence alone would ordinarily follow (*res ipsa loquitur*) and
> (5) the owner has in rebuttal relied upon the inevitable character of the mishap,
> (6) such owner must either (a) point out the cause of the mishap and show that he was in no way negligent in connection with it or
> (b) show all possible causes and negative his fault in connection with every one of them.

2. The Doctrine of Inevitable Accident Is Not Applicable in This Case.

Looking at the facts of the case at bar in the light of the rule of inevitable accident, we find first that claimants have not sustained the burden of proof of the negligence of petitioner which was upon them, it being decreed by the District Court

> "1. That the accident described in the libel and petition herein was not caused by the design or negligence of the petitioner * * *" (478).

Here then we have a specific decree that claimants have not sustained their burden of proof. This burden of proof claimants sought to sustain both by evidence as to the *specific negligence* charged and by reliance upon the *presumption of negligence* from the happening of the mishap. The court in decreeing that the accident was not caused by the negligence of petitioner necessarily decided (1) That the claimants had not sustained their burden of proof of negligence by a preponderance of the evidence and (2) That the accident was not *res ipsa loquitur*.

Accordingly, we submit that claimants have not satisfied one of the first requirements of the doctrine of inevitable accident, viz., that of sustaining by *proof* or *presumption* the *burden of proof* cast upon them; that the decree of the District Court is correct and should be final; and that having failed in satisfying this requisite of the rule, claimants cannot invoke it. It is a plain case of the District Court not being satisfied with the proof of actual negligence and being also satisfied that the circumstances of the accident did not bring the case within the rule of *res ipsa loquitur*.

Our contention regarding the requirement of claimants sustaining their burden of proof before the doctrine of inevitable accident can be called into operation is, we submit, the only method by which the rule regarding the burden of proof in negligence cases can be reconciled with the cases applying the doctrine of inevitable accident.

We further submit that in all the specific instances cited by claimants where the rule of inevitable accident has been applied it has also been held that the accident was either proven to be caused by *actual negligence* or the court held it to be *res ipsa loquitur*.

Inasmuch as the District Court's *decree on the facts* finds that claimants have utterly failed to prove negligence on the part of petitioner, and as the case is not one where negligence can be properly inferred from the accident, there is no basis for the application of the doctrine of inevitable accident.

3. If the Doctrine of Inevitable Accident Be Applied, Nevertheless It Has Been Satisfied.

Even though the doctrine of inevitable accident be considered applicable, claimants cannot gain any advantage because of it, the requirements of the doctrine having been satisfied by petitioner's proof of the cause of the accident and the entire absence of negligence in connection with such cause.

The District Court was satisfied from the evidence that "the real cause of the accident was these ground swells" (473).

In this connection, and answering the argument made on page 23 and elsewhere in claimants' brief, we respectfully submit that there is ample evidence in the record to prove correct the statements in the opinion of the court about the cause of the accident. In this connection, we would refer to pages ..... to ....., inclusive, ante, of this brief, where the acci-

dent and the accompanying conditions of the course, wind, and wave are fully considered. Here we merely repeat the explanation of the accident as given by Captan Kruger:

> "Q. What is the explanation, if any you have, of the reason for the bridle parting?
>
> A. Well, the way I could explain it is that the barge was at times swinging from one side to the other and going with the sea, and sometimes my boat would go ahead, the 'Three Sisters' and jerk the line when it got between the seas and running with the sea" (98).

This explanation conforms substantially with the statement of the court as to the cause of the accident (473, 474); and when considered in connection with the common maritime knowledge of the court and the opinions of the expert Captain Mohr (395, 396, 397, 398) gives a convincing explanation of the accident absolving petitioner from all fault.

(e) Assumption of Risk.

Claimants Assumed All of the Risks Inherent in the Obviously Dangerous Place Aboard Where They Were Playing Cards at the Time of the Accident.

For sometime prior to, and at the time of, the accident claimants Carlsen and Sauder were playing cards (whist) with claimants' witnesses George Reid and Fred Woods at the stern of the "Three Sisters" near the stern grating and between the starboard stern bitt and the hatch. Their respective positions are shown by the following testimony of claimants' witness George Reid:

"Mr. Lillick. Q. You said the other day that Mr. Sauder was sitting underneath the tow-line. Will you explain that a little more fully, Mr. Reid, where the men were sitting with relation to the tow-line while they were playing cards?

A. Yes. Mr. Sauder was sitting back, with his back to the tow-line.

Q. I am reading to you from your testimony of the other day: (Testimony of George Reid):

'Q. Where do you place the various men who were on the "Three Sisters" belonging to your crew, Carlsen and your crew, where do you place them at the moment that the line broke?

A. Carlsen was sitting on the stern, and I was sitting opposite him. Mr. Sauder was sitting underneath the two-line, and the cook was sitting across from him.'

As I understand that answer, it indicates that Mr. Carlsen was sitting with his back to the stern, on that little grating; you were sitting opposite him; Mr. Sauder was sitting near to the port side and underneath the tow-line, and the cook, or the other man, nearer the rail; is that correct, or isn't it?

A. Yes, that is it.

Q. That tow-line, then, was swinging either over Sauder's head or behind his head, but a few inches away, wasn't it?

A. Yes" (387-388).

"Q. Which of them was nearer the line?

A. Both of them were pretty near the line.

Q. By that, do you mean the cook and Carlsen, or the cook and Sauder?

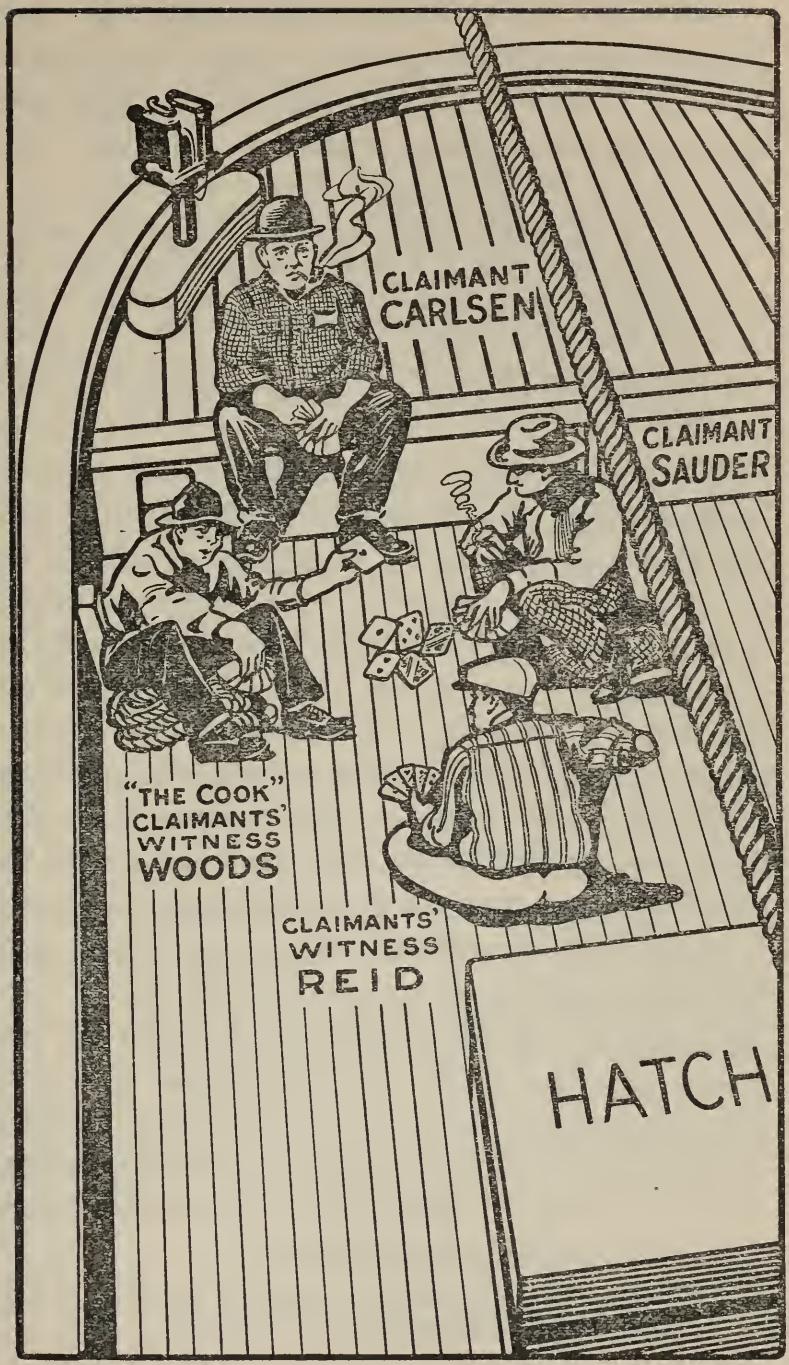
A. Me and Sauder were the closest to the line" (375).

The position of claimant Carlsen is fixed with certainty by his testimony following:

"Q. How close was the tow-line to you when you were sitting down?

A. It was a matter of two or three feet from me, I suppose" (325).

Taking into account the fact that the "Three Sisters" was a vessel of only 15-6/10 feet at her beam; that Carlsen was sitting on the stern grating but two or three feet from the line (325); that the game being played was whist (375), which would require a considerable spreading of the players, and that Sauder and Reid "were closest to the line", it would necessarily follow that claimant Sauder's head was all but touching the line. The following sketch shows the position of the players while playing cards upon the deck of the vessel:


CLAIMANT
CARLSEN
CLAIMANT
SAUDER
"THE COOK"
CLAIMANTS'
WITNESS
WOODS
CLAIMANTS'
WITNESS
REID
HATCH

Claimants argue that the place where the card players were situated at the time of the accident was not in fact dangerous, and to take issue with the statement of Judge Partridge delivered from the bench in his oral opinion that

> "It is not, however, denied that it was a dangerous place, for the reason that the experience of all seafaring men has shown that the vicinity to where a hawser is fastened, when the vessel has another vessel in tow, is a dangerous place" (Claimants' Brief pages 72, 73).

Claimants contend that "There is no evidence whatever that 'the experience of all seafaring men has shown it to be so' ". We submit that when the court informally said "It is not, however, denied that it was a dangerous place" he did not refer to the pleadings but to the proof in which there is not one word to show that the place was not in fact dangerous, claimants in their evidence not rebutting in any wise the showing of the petitioner on that point. We submit further that the statement of the court that the place was dangerous according to the knowledge of all seafaring men, is not only a fact of common knowledge of which this court as a court of admiralty will take cognizance, but that the seafaring men among claimants' witnesses, as well as the only expert called at the trial, established beyond dispute that Judge Partridge's statement in that behalf is correct. Here follows the testimony of claimants' witness Owen Haney:

> "Q. Why didn't you stay on the rear deck?
> A. Why didn't I?

Q. Yes.

A. Because I wanted to talk to the fellow in the pilot-house, maybe; I just happened to walk up there.

Q. Did you not appreciate that there was some danger from that tow-line?

Mr. HEIDELBERG. That is objected to as being immaterial, irrelevant and incompetent.

The COURT. Objection overruled.

A. *Well, there is always danger"* (263, 264).

Captain Mohr merely repeated the common maritime knowledge on the subject when he testified:

"Q. Do you regard the stern of the tug under tow as being a safe and proper place for a man to be with a view to his personal safety?

Mr. HEIDELBERG. Objected to as immaterial, irrelevant and incompetent.

The COURT. Let him answer.

A. *No, sir"* (398).

It is strange indeed that claimants should now deny that the stern of the "Three Sisters" was in fact dangerous in view of the implied admission of claimants contained in the following question by claimants' proctor Mr. Heidelberg, and the following answer by claimants' witness Philip Evans:

"Q. Of course, you knew afterwards, when the tow line broke and snapped back, you know now that that part of the boat was dangerous?

A. Yes" (352).

Immediately after this question and answer we find in the record the following:

Recross Examination.

"Mr. LILLICK. Q. Mr. Evans you knew it was a dangerous place before, didn't you?

A. *Well, that is the rule.*

Q. That is the dangerous part of the boat when they are towing, isn't it?

A. *As a rule, yes*'' (352).

The following is taken from the cross-examination of claimants' witness, Philip Evans:

Mr. LILLICK. Q. (Continuing) You thought it was a little dangerous back there, didn't you, alongside of that hawser?

Mr. HEIDELBERG. That is objected to as immaterial, irrelevant and incompetent, as to what this man thought about it. It is immaterial what he thought about it; it is only material as to what Carlsen and Sauder thought about it.

The COURT. No, not at all. This man is an old sailor. He has a right to give his opinion. Objection overruled.

Mr. LILLICK. Q. (Continuing) You didn't want to go back there alongside that hawser, did you, when there was a place in the alley?

A. No.

Q. Is it not true that wherever there is a hawser like that on a towboat you keep away from the hawser?

A. Yes.

Q. *And it is generally known among the seafaring men that if that hawser snaps somebody is going to get in trouble; that is true, isn't it?*

A. *Yes, sir.*

Q. And the reason you didn't go back there was because you were in a safe place up there in that little alley where you would not get hurt?

A. Yes, it was about as safe a place as any.

Q. It was a great deal safer than back there where the hawser was, wasn't it?

A. Sure.

Q. And that is why you were there, that is true, isn't it?

A. Well, there was not much room about the boat, and I suppose everybody could suit themselves.

Q. And you suited yourself by going in a safe place; that is true, isn't it?

A. Yes, that was a safe place to be" (Evans 349, 350).

We earnestly urge in defense of remarks of the learned court below in his oral opinion in this case, that not only was he justified in saying "It is not, however, denied that it was a dangerous place", but that he was likewise entirely right in adding that such a conclusion was justified by the "experience of all searfaring men". Claimants' proctors' supertechnical criticism of the court's oral opinion, is we submit, entirely unjustified.

We submit under the facts here presented that both claimants Carlsen and Sauder knew, or had reasonable apprehension of, the dangerous character of their positions. We are at a loss to comprehend how claimants can seriously urge that they were "non-seafaring men" (Claimants' brief p. 73) in view of their occupation of pile-driving and their consequent familiarity with things maritime. The witnesses who testified for claimants in this case were all members of the pile-driver crew, and all of them exhibited great familiarity with maritime affairs as is shown by their easy use of nautical terms throughout their testimony. It can hardly be said, in view of what the record shows regarding the

maritime knowledge of these pile-driver men, and in view of the common knowledge as to the nature of their occupation, that they are not seafaring men.

There can be no reasonable conclusion but that claimant Carlsen knew his position to be dangerous. He was sitting where at all times he was able to see the tow line, note its movement and taut condition and his own proximity to it (325). He was a seafaring man (316) and had been an able seaman for over four or five years, having sailed mostly on windjammers "all around" and to Canada, England, Australia and the Hawaiian Islands (316). He was foreman of the pile-driver crew (129), and by the nature of his vocation must have been familiar with cordage. He was familiar with towing operations (317).

Claimant Sauder must likewise have known his danger. He was a member of the pile-driver crew. It is a matter of common knowledge that the work of a pile-driver man is largely upon water; that he is frequently towed by boat from place to place; that he is required to be familiar with cordage; and that he frequently goes to and returns from his work by boat. A pile-driver man could not help but realize his danger in such a position as Sauder was in at the time he was injured.

Even had these claimants been mere landsmen, it is obvious that they would have known their danger. Certainly any landsman of ordinary intelligence and with ordinary regard for his own safety, would be

bound to know that such a position as all of these card players assumed on the deck of the "Three Sisters" was in fact dangerous. Certainly no landsman who voluntarily sat with his back to a taut tow-line a few inches from his head, as Sauder did, or who voluntarily sat facing a tow-line two or three feet away, as Carlsen did, can be held not to have known or had reasonable cause to apprehend his danger.

Claimants insist that they did not voluntarily assume this dangerous position, but were virtually forced to occupy the place where they were injured because "it was the only place where they could be" (Claimants' brief p. 73). This contention is preposterous, in view of the evidence, and the District Court's observations aboard ship.

It is not disputed that the entire starboard side, the galley and the forecastle of the "Three Sisters" were available for the men.

Claimants' witness Owen Haney, admitted upon cross-examination that there was enough room for all of the men on the foredeck and starboard side of the vessel. He was on the foredeck opposite the wheelhouse with claimants' witness Philip Evans, at the time of the accident. His testimony on this point is as follows:

> "Q. What is your recollection of the room there was on the foredeck for other men besides you and the man who was with you? Was there room for all of you there?

Mr. HEIDELBERG. That is objected to as assuming something not in evidence, to-wit: that the man was on the foredeck.

Mr. LILLICK. He has already said he was forward of the pilot house.

Mr. HEIDELBEG. No, he didn't. He said he was alongside it.

The COURT. Let him answer the question.

A. Well, I guess if they wanted to string out along there, they might be able to string out along there" (263).

An excuse for the dangerous position of the card players which claimants sought to develop at the taking of the deposition of claimants' witness John True Urquhart, at Los Angeles, over four months before the trial, but one which was not further sustained at the trial, was that the foredeck of the "Three Sisters" was not available for the occupation of the men because the sea was breaking over the bow. Although this contention was exploded at the trial, proctors for claimants are urging it here (Claimants' brief p. 73). Urquhart not only testified that "an occasional dip was taken and the water would run aft alongside the house", but went further and said that at the time of the accident the sea was such that men standing at or in front of the wheelhouse and men standing opposite the engine house would be drenched by the sea (50, 51).

Urquhart's testimony is not only proven untrue by the physical impossibility of the "Three Sisters" taking sea by the bow when on her course of E x S ½ South with the wind and sea at her star-

board quarter (Kruger 97, 98; Mohr 397; Anderson 169), but his testimony is opposed by claimants' own witnesses Owen Haney and George Reid.

"Q. Where were you standing on the way down?

A. You mean coming to Frisco?

Q. Coming from Pt. Reyes to San Francisco, and before the accident.

A. Alongside the pilot house.

Q. On the starboard side?

A. Yes, sir.

Q. You were one of the men who were talking to Anderson?

A. Yes.

Q. Was there any water breaking over you?

A. Once in a while there would be some spray.

Q. *Did you get wet?*

A. *No.*

Q. There was not enough coming over to wet you in any way, was there?

A. Not right at that time, there was not.

Q. I am speaking of the time up to the accident; there was not enough to wet you, was there?

A. I don't think I was wet very much" (Haney 262, 263).

"Q. *Did you notice any water on the deck of the 'Three Sisters'?*

A. *No*" (Reid 376).

It is significant that after the course of the vessel, and the conditions of wind and wave were fixed at the trial, claimants did not produce any evidence to further their lame excuse of a wet foredeck, although their witness, Evans, was with their witness

Haney on the foredeck for a considerable time prior to and at the time of the accident.

Another excuse brought forward by Urquhart was that the men could not occupy the forecastle because of the alleged order of the Captain regarding gasoline fumes and smoking down there (Urquhart 52). This excuse was not further urged at the trial for the very obvious reason that it developed that the "Three Sisters", being a deisel boat, did not use gasoline as a fuel, but used crude petroleum (143, 144).

Captain Kruger testified that the bow was clear (87).

He was contradicted on this point only by the testimony of claimant Carlsen, who testified that the bow was occupied by iron cots (305), and the testimony of claimants' witness Fred Woods, who testified that on the deck forward of the house were stowed a stove and iron cots (422).

Claimants' witness Philip Evans, who remained stationed forward and was one of the men who had an unobstructed view of the bow during practically the entire voyage, testified that the stove was "on the forepart of the pilot house", but did not add one word to show that the bow was not otherwise clear (344).

Claimants' witness Urquhart, testified on this point as follows:

"Q. Then it would be your present recollection that the bow of the 'Three Sisters' was clear upon the return voyage?

A. I am not positive that the casks were there; otherwise the deck would be clear" (53).

When the evidence in this case was concluded there did not remain in the record one plausible excuse for the dangerous position of the injured men, and the only reasonable conclusion from the evidence is that they wilfully assumed their dangerous position, either in disregard of the Captain's warnings (95, 138) or at any rate with their eyes wide open as to the inherent danger of the taut swaying tow-line.

Under the facts in the record claimants are absolutely precluded from any recovery under the rule of decision of this court upon the doctrine of assumption of risk.

In the case of *Smith v. Day,* 100 Fed. 244, a decision of this court, a passenger went aboard a steamer which was known by him to be in close proximity to blasting operations. Like claimants here, he engaged in a game of cards. He was struck by a stone and sued the carrier for negligence. Judge Ross in delivering the opinion of the court, said:

"The plaintiff and his fellow passengers went upon the premises where the blasting was being done with their eyes open. Their right there, whether it was a right by sufference or license, implied or otherwise, was subordinate to the right of the defendants to prosecute the work

> in which they were engaged. These passengers assumed all risks necessarily incident to such work prosecuted with skill and reasonable care —such care as is usually employed under like circumstances. They had a right to expect, and are presumed to have relied upon, this degree of care."

It need only be briefly pointed out that the only expert evidence in the record here shows that the present towage operation was carried out with skill and reasonable care (396-397), and that the degree of care on the part of petitioner required by the decision of this Court in *Smith v. Day, supra,* has more than been complied with.

The comparatively recent case of *The Great Northern,* 251 Fed. 826, was a cause brought by libel to recover for personal injuries sustained by a passenger on board the steamship "Great Northern" from a lurch of the ship which caused him to fall while taking a shower bath. He had the alternative of using the ordinary stationary bathtub on board, but chose to use the shower. This court held that by so doing he assumed the risk, Judge Gilbert saying:

> "While a ship is bound to a high degree of care for the safety of a passenger, the passenger is also required to exercise a reasonable care for his own safety. (Citing authorities.) The appellant was a man 47 years of age. He had been in the plumbing supply business, and had dealt in materials such as that of which the floor of the bathroom was constructed. He must have known, as everyone who takes a bath

> knows, that such enameled ware is smooth, and when wet is slippery. He saw that the floor of the shower bath was wet. He had an opportunity to see and must have seen, what handholds there were. The whole situation was visible to him. There were no latent defects. He knew that a ship at sea was likely to lurch. He knew that stationary bathtubs were available for his use. He chose to use the shower bath, and he assumed whatever risk its obvious condition subjected him to."

It is submitted that as the bar of assumption of risk requires only the concurrence of the following elements:

1. The voluntary assumption by the injured person of a position in fact dangerous when a safe place is available for him.

2. The exercise by the person in control of the operation of "such care as is usually employed in like circumstances", and

3. Knowledge of or reasonable cause to apprehend his danger on the part of the injured person,

and as all of these elements appear in the record in this case, claimants are barred from recovery on the ground of their voluntary assumption of the risks which caused their injuries.

It is further submitted that this preclusion is absolute inasmuch as the doctrine of assumption of risk is independent of the rule of divided damages.

> "The doctrine of assumption of risk is applied in admiralty, however, as freely as in

other branches of jurisprudence, notwithstanding the rule that damages will in some cases of concurrent negligence be divided."
1 *Corpus Juris,* pp. 1327, 1328.

See also: *The Scandinavia,* 156 Fed. 403, at p. 407 and following, where an extended discussion of this question is to be found.

(f) Contributory Negligence.

Claimants Were Injured Through Their Own Gross, Wilful and Inexcusable Negligence, and Are in Consequence Absolutely Barred From Recovery.

Although we cannot conceive of there being any negligence on the part of the petitioner proven or presumed in this case, for the purpose of a full presentation of the law by any possibility here applicable, we are setting forth our view of what the evidence shows of the negligence of claimants and our contention regarding the legal result thereof.

It is certainly established that, even assuming negligence on the part of petitioner (a violent assumption indeed under the evidence), claimants were guilty of such gross, wilful and inexcusable disregard for their own safety as would amount at common law to contributory negligence operating as an absolute bar to all relief.

Claimants urge that even though this be true, they would be entitled to a decree for divided damages under the rule of *The Max Morris,* 137 U. S. 1.

The Max Morris, although decided in 1890, is the last expression of the Supreme Court as to the

effect of contributory negligence in admiralty. At first impression, this case would seem to be authority for the rule that in admiralty, contributory negligence is not an absolute bar to recovery as at common law, but that the matter of the apportionment of damages lies in the discretion of the court.

> "Contributory negligence, in a case *like the present,* should not wholly bar recovery. There would have been no injury to the libellant but for the fault of the vessel; and while, on the one hand, the court ought not to give him full compensation for his injury, where he himself was partly in fault, it ought not, on the other hand, to be *restrained* from saying that the fact of his negligence should not deprive him of all recovery of damages. As stated by the District Judge in his opinion in the present case, the more equal distribution of justice, the dictates of humanity, the safety of life and limb and the public good, will be best promoted by holding vessels liable to bear some part of the actual pecuniary loss sustained by the libellant, *in a case like the present,* where their fault is clear, *provided the libellant's fault, though evident, is neither wilful, nor gross, nor inexcusable, and where the other circumstances present a strong case for his relief.* We think this rule is applicable to all like cases of marine tort founded upon negligence and prosecuted in admiralty, as in harmony with the rule for the division of damages in cases of collision. The mere fact of the negligence of the libellant as partly occasioning the injuries to him, when they also occurred partly through the negligence of the officers of the vessel, does not debar him entirely from a recovery.

> The necessary conclusion is, that the question whether the libellant, upon the facts found, is entitled to a decree for divided damages, must be answered in the affirmative, in accordance with the judgment below. This being the only question certified, and the amount in dispute being insufficient to give this court jurisdiction of the whole case, our jurisdiction is limited to reviewing this question. *Chicago Union Bank v. Kansas City Bank,* 136 U. S. 223. Whether, in a case like this, the decree should be for exactly one-half of the damages sustained, or might, in the discretion of the court, be for a greater or less proportion of such damages, is a question not presented for our determination upon this record, and we express no opinion upon it."

A careful examination of the opinion will show that the rule of divided damages in case of personal injuries can only be invoked where the libellant's (in this case claimants') fault is neither wilful, nor gross, nor inexcusable, and the circumstances of the case present a strong case for his (or their) relief, and that in the absence of the invocation of the rule of divided damages the preclusion worked by contributory negligence remains absolute.

It is submitted, by the decision of *The Max Morris* the rule of divided damages operates only in a limited number of cases of concurrent negligence in the absence of wilful, gross or inexcusable fault on the part of the injured party.

In view of the fact that claimants, although warned by the Master or at least by the circumstances of a taut swaying tow line right at their

heads, and a tug rolling and pitching in heavy swells, remain playing cards in a place where any man of common knowledge and sense would have realized the impending danger, their conduct under the circumstances must certainly be characterized as wilful and gross and inexcusable and in view of the entire evidence, how can it be said that this is otherwise a strong case for their relief?

The District Court decisions cited by claimants with *The Max Morris* on page 81 of their brief all merely reaffirm without extension the rule of *The Max Morris.* One of these cases, *The Tourist,* 265 Fed. 700, clearly supports our position on the point under discussion. On pages 704 and 705 of the Reporter (265 Fed.) we find the following:

> "In such cases the reasoning of Judge Addison Brown is clearly applicable, and the decisions of admiralty courts have sustained his conclusion that the public good is clearly promoted by holding vessels liable to bear some part of the actual pecuniary loss, *where their fault is clear,* provided that the libellant's fault, though evident, *is neither wilful, nor gross, nor inexcusable.* In the case before me I find that the libellant was at fault, *although his fault does not appear to me to be 'wilful, gross nor inexcusable'.*"

It is respectfully urged that no fair application of the rule of *The Max Morris* would uphold a decree for divided damages in this case.

B. THE ISSUE OF LIMITATION.

It is unnecessary, in view of the record now before this court, to enter into any extended discussion of the evidence on this issue. We consider that our right to limit is so patent under the law that few references to the evidence need be made.

This proceeding was instituted to secure for petitioner the protection of the following substantive enactment of Congress:

> "Sec. 4283 *(Liability of owner not to exceed his interest).* The liability of the owner of any vessel, for any embezzlement, loss or destruction, by any person, or any property, goods or merchandise, shipped or put on board of such vessel, or for any loss, damage or injury by collision, or for any act, matter or thing, loss, damage or forfeiture done, occasioned or incurred without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending."
>
> Act of March 3, 1851, Ch. 43, 9 Stat. L. 635, Sec. 4283 R. S.

See

6 *Fed. Stat. Ann.* (2d Ed.), p. 336 and fol.;
7 *U. S. Compl. Stat.* (1916), p. 8534 and fol.;
Sec. 8021 *U. S. Compl. Stat.* (1916).

In determining whether petitioner is entitled to the benefit of limitation, the only question for adjudication is whether the cause of loss was done, occasioned or incurred without the privity or knowledge of petitioner.

1. Privity or Knowledge.

The "privity or knowledge" of Sec. 4283 R. S. has been defined as follows:

> "As used in the Statute, the meaning of the words 'privity or knowledge' evidently is a *personal participation* of the owner in some fault or act of negligence causing or contributing to the loss, or some personal knowledge or means of knowledge of which he is bound to avail himself of a contemplated loss, or of a condition of things likely to produce or contribute to the loss, without adopting appropriate means to prevent it. There must be some *personal concurrence* or some fault or negligence on the part of the owner himself, or in which he *personally participates,* to constitute such privity, within the meaning of the Act, as will exclude him from the benefit of its provisions."
>
> *Lord v. Goodall, etc. S. S. Co.,* 15; Fed. Cas. No. 8506; affirmed, 102 U. S. 541.

It is also established that where, as in the instant proceeding, a corporation is the petitioner, the privity or knowledge must be that of the "Managing Officers" of petitioner.

> *Craig v. Continental Insurance Co.,* 141 U. S. 638, 35 L. Ed. 886;
>
> *The Princess Sophia* (W. D. Wash. 1921), 278 Fed. 180 at p. 190.

The last proposition is established without dissent in the decisions. The leading case, *Craig v. Continental Ins. Co.,* and one of the last decided cases, *The Princess Sophia,* are therefore cited only as illustrative of the generally recognized rule.

The following portion of the opinion in the case of *"The Princess Sophia"* (W. D. Wash. 1921), 278 Fed. 180, gives an exhaustive discussion of the question under consideration:

> "Recurring to Section 4283, *supra,* it is apparent that the vital issue in limitation of liability is privity or knowledge of the owner.
>
> 'Privity means participating with others in the knowledge of a secret transaction; privately knowing; specially in law having any knowledge of or connection with something.' Std. Dict.
>
> 'To know is to be thoroughly acquainted. In a strict sense, the clear and certain apprehension of a truth.' Std. Dict.
>
> Judge Sawyer in *Lord v. Goodall, etc. S. S. Co.,* Fed Cas. No. 8506, said:
>
> 'The meaning of the words "privity or knowledge" is a personal participation of the owner in some fault or act of negligence, causing or contributing to the loss'.
>
> In *McGill v. Mich. S. S. Co.,* 144 Fed. 788, 75 C. C. A. 518, the Ninth Circuit Court said:
>
> 'The right of a shipowner to limit its liability is dependent upon his want of complicity in the acts causing the disaster.' * * *
>
> Privity or knowledge, as used in the statute, imports an actual knowledge causing or contributing to the loss or knowledge or means of knowledge of a condition of things likely to produce or contribute to the loss without adopting proper means to prevent it. Butler v. Boston S. S. Co., 130 U. S. 527, 9 Sup. Ct. 612, 32 L. Ed. 1017; Craig v. Continental Ins. Co., 141 U. S. 638, 12 Sup. Ct. 97, 35 L. Ed. 886; La Bourgogne, 210 U. S. 95, 28 Sup. Ct. 664, 52 L. Ed. 973; City of Columbus (D. C.), 22 Fed. 460; In re Meyer (D. C.), 74 Fed. 881; The Longfellow, 104 Fed. 360, 45 C. C. A. 379; The

Southside (D. C.), 155 Fed. 364; The Rochester (D. C.), 230 Fed. 519.

Judge Brown in *The Colima* (D. C.), 82 Fed. 665, at page 679, said:

'The knowledge or privity that excludes the operation of statute must therefore be in a measure actual, and not merely constructive; that is, actual through the owner's knowledge, or authorization or immediate control of the wrongful acts or conditions or through some kind of personal participation in them * * *'.

Judge Wolverton, in *The Indrapura* (D. C.), 171 Fed. 929:

'There must be personal participation in the act of delinquency or omission leading to the loss.'

Judge Gilbert in *The Annie Faxon,* 75 Fed. 312, 21 C. C. A. 366:

'It is sufficient if the corporation employ, in good faith, a competent person to make such inspection (boiler). When it has employed such a person in good faith, and has delegated to him that branch of its duty, its liability beyond the value of the vessel and freight, ceases * * *.'

Mr. Justice White in *LaBourgogne, supra:*

'Mere negligence, pure and simple, in and of itself does not necessarily establish the existence on the part of the owner of a vessel of privity and knowledge within the meaning of the statute'.

It appears to be well settled that where the owner in good faith appoints a competent agent to equip, man, or maintain a vessel or her machinery, any acts of omission or commission of the agents, not participated in personally by the owner, do not constitute privity or knowledge. The Annie Faxon, 75 Fed. 312, 21 C. C. A. 366; The No. 6, 241 Fed. 69, 154 C. C. A. 69;

Boston Marine Ins. Co. v. Metropolitan, etc. L. Co., 197 Fed. 703, 117 C. C. A. 97; Quinlan v. Pew, 56 Fed. 111, 5 C. C. A. 438; Craig v. Continental Ins. Co., 141 U. S. 638, 12 Sup. Ct. 97, 35 L. Ed. 886; The Marie Palmer (D. C.), 191 Fed. 79; The Murrell (D. C.), 200 Fed. 826. * * *

In *The Erie Lighter,* 108 (D. C.), 250 Fed. 490, it was held:

'It is also entirely well settled that an owner, and in the case of a corporation, the managing officer or officers (in this case the Superintendent of the marine department) may employ others to perform the duties ordinarily imposed by law upon the owner, such as equipment, examination, repairs, etc., and if due diligence is exercised in selecting persons competent for such work, losses or damages done or occasioned through their fault, without actual complicity or knowledge on the part of the owner, are done or occasioned without the "privity or knowledge" of the owner, within the meaning of the Limited Liability Acts. Craig v. Continental Ins. Co., *supra;* The Annie Faxon (D. C. Wash.), 66 Fed. 575, affirmed 75 Fed. 312 (C. C. A. 9th Cir.): The Colima, *supra;* The Jane Gray (D. C. Wash.), 99 Fed. 582: Van Eyken v. Erie R. R. Co.. * * * 117 Fed. 712; McGill v. Michigan S. S. Co., 144 Fed. 788, * * *: Oregon Lumber Co. v. Portland & Asiatic S. S. Co., *supra* (162 Fed. 912); Boston Marine Ins. Co. v. Metropolitan Redwood Lumber Co., *supra;* Quinlan v. Pew, *supra;* The *Tommy,* 151 Fed. 507'."

In the case of *Pocomoke Guano Co. v. Eastern Transp. Co.,* 285 Fed. 7 (C. C. A. 4, 1922), in holding that a corporate owner might limit its liability for a loss caused by the unseaworthy condition of a

barge where it had exercised good faith and due diligence in the employment of men to put in repair and condition the barge, the court said:

> "Corporations, like others, are entitled to the benefit of limitation of liability from conditions to which they are not privy, and of which they have no knowledge, and they are chargeable with knowledge of the existence of defects, or become privy to acts of negligence causing the same, only when persons representing the corporation in such capacities as to speak for the same are guilty of some negligence or omission to maintain the barge in seaworthy condition. They are likewise exempt from liability for the negligence of third persons employed to repair and put the barge in seaworthy condition, where they have, in good faith, exercised due diligence and care in the selection of such persons; that is to say, those trustworthy, experienced and capable of performing the service, and of good reputation in the business."

Judge Manton of the Second Circuit, in delivering the opinion of the court in *The Oneida,* 282 Fed. 238, holding the owner of a launch entitled to limitation for negligent stranding of a scow, said:

> "Where it appears that a private vessel or a launch is properly manned and equipped at the time of the accident, and the injury occurs without the owner's privity or knowledge, he may be liable for the same only to the extent of the value of the vessel. Under the Act of Congress, he is only chargeable for his willful and negligent acts and the negligence of those in charge of the navigation of the vessel, to which he was not privy and of which he had no knowledge, will not be imputed to him. The Republic, 61 Fed. 109, 9 C. C. A. 386; The

Tommy, 151 Fed. 570, 81 C. C. A. 50; The Alola (D. C.), 228 Fed. 1006.

The knowledge or privity that excludes the operation of the statute must be in a measure actual, and not merely constructive. It must be actual in the sense of knowledge or authorization, or immediate control of the wrongful acts or conditions, or through some kind of personal participation in them. The Colima (D. C.), 82 Fed. 665; Quinlan v. Pew, 56 Fed. 111, 5 C. C. A. 438; The La Bourgogne, 210 U. S. 95, 28 Sup. Ct. 664, 52 L. Ed. 973. There was no evidence in the record indicating that appellee's launchman was incompetent. His long period of service with appellee and his familiarity with the waters in question negatives the idea of incompetency and leads us to conclude that the Oneida was property manned at the time of towing."

"The Tommy", 151 Fed. 570 (C. C. A. 2, 1907), was a case where the loss was occasioned by the breaking of a pair of lifting tongs borrowed by the Master of "The Tommy" from another barge. In holding that the owner might limit his liability, the court there stated:

"* * * It nowhere appears that libelant was negligent in employing either Thompson or Benson or that either of them was unfit to discharge the duties of barge captain. Assuming that the tongs were unfit for this particular service, it appears that libelant had no notice of such unfitness. It would seem to follow, therefore, that the damage was occasioned without the privity or knowledge of the libelant, who provided suitable equipment and appliances and the usual and proper means for replacing the same when they were unfit or worn out."

In *The Republic,* 61 Fed. 109 (C. C. A. 2, 1894), the court, in discussing the construction of the statute limiting liability, suggested that it would be a hard construction to deprive the shipowner of protection where a loss had occurred from the unseaworthy or defective condition of the vessel, without knowledge of the owner and without his personal negligence, and held as follows:

> "It was the intention of Congress to relieve shipowners from the consequences of all imputable culpability by reason of the acts of their agents or servants, or of third persons, but not to curtail their responsibility for their own willful or negligent acts. Moore v. Transportation Co., 24 How. (U. S.) 1, 16 L. Ed. 674; Walker v. Transportation Co., 3 Wall. (U. S.) 150, 18 L. Ed. 172; Craig v. Insurance Co., 141 U. S. 638, 12 Sup. Ct. 97, 35 L. Ed. 886; Quinlan v. Pew, 56 Fed. 111, 5 C. C. A. 438; Hill Manuf'g Co. v. Providence & New York Steamship Co., 113 Mass. 495, 18 Am. Rep. 527."

See also

Van Eyken v. Erie Railroad Co. (D. C.), 117 Fed. 712.

The foregoing authorities clearly establish the rule that where the owner has provided a suitable person or persons to inspect, or provide for the proper equipment of a vessel, he is not deprived of the benefit of the statute by proof of negligence of such persons where he has no notice or knowledge of such negligence or its resultant defect.

(a) Petitioner Was Without Privity or Knowledge.

If any privity to or knowledge of any negligence be considered as proven here, it would attach to but two employees of petitioner, viz.: (a) The Master of the vessel, Captain Kruger, or (b) the Port Engineer of the Company, Oroville Davis.

In order to deprive petitioner of the benefit of limitation of liability it must be established that the privity or knowledge was that of a "managing officer" of the corporation, and, as it is obvious from the uncontradicted evidence in the record that petitioner had no "managing officers" except its directors and executive officers, and, as it has been established without dispute that they were not in any way connected with the cause of the present mishap, it follows that petitioner was without privity or knowledge and is without question entitled to limit its liability.

The distribution of managerial power in the petitioner corporation is established by the testimony of Alexander Paladini, president and general manager of petitioner.

Claimants, however, seek to deprive petitioner of the benefit of the statute by the contention that the privity or knowledge of the Master of the "Three Sisters", Captain Kruger, and/or petitioner's Port Engineer, Davis, was the privity or knowledge of petitioner (Claimants' Brief, p. 83 and fol.).

Regarding the privity or knowledge of the Master of a vessel it was long ago settled that unless he be

one of the owners, his privity or knowledge is not a bar to limitation of liability.

Butler v. S. S. Co., 130 U. S. 527, 32 L. Ed. 1017;

Craig v. Insurance Co., 141 U. S. 638, 35 L. Ed. 886;

The Bordentown, 40 Fed. 682, at pp. 686 and 687;

Quinlan v. Pew, 56 Fed. 111, at p. 117.

To hold otherwise would defeat the very purpose of the act, and no further argument is necessary to show that petitioner cannot be charged with the privity or knowledge of its Master, Captain Kruger.

Claimants contend that the employee of petitioner, Port Engineer Davis, was a "managing officer" of the Company.

The statement on page 84 of claimants' brief that

> "A. Paladini, the president of petitioner corporation, himself testified that 'the actual operation of the vessels, the equipment of the vessels, the running of the vessels, was intrusted to the Port Engineer",

is wholly misleading and does not state either the substance or effect of Alexander Paladini's testimony. We here set forth at length such portions of Alexander Paladini's testimony as treat of Davis' powers and duties as an employee of petitioner:

> "Q. How many directors are there of A. Paladini, Inc.?
> A. Seven, I think.
> Q. Who are they?

A. Myself; Attilio Paladini; Walter Paladini; Hugo Paladini; Henrietta Paladini; Joseph Chicca, who is the secretary.

Q. Which of those directors have any position with the company requiring them to be at the office or offices of the company?

A. I don't get you.

Q. Which of those directors has any position with the company requiring them to be at the office or offices of the company; which of them take an active part in the business?

A. All of them are taking an active part in the business outside of Henrietta Paladini and Hugo Paladini.

Q. What positions do they occupy, I mean the others?

A. My brother Attilio is manager of the Oakland Branch; Walter is with me in the wholesale house; Mr. Chicca is secretary. That is about all. I am the president.

Q. What have they to do with the actual operation of the vessels, the equipment of the vessels, the running of the vessels?

A. Nothing, whatsoever.

Q. How do the vessels obtain their orders, as to what to do and where to go?

A. Through Mr. Davis, the port engineer.

Q. What does that port engineer actually do?

A. The port engineer comes to my market every morning and asks me, or, if I am not there he may ask my brother, if I happen to be out of town, if there are any instructions to be had, and if so we give them to him, and he, in turn, carries them out.

Q. What do you mean by instructions, what kind of instructions?

A. If I have fish at Point Reyes, and I get a telephone from my place up there that there are fish up there, we will tell him to get the boat ready and send it out and pick up the salmon at Point Reyes.

Q. What do you do, or what do any of the directors do, about seeing to it personally whether the boat is properly equipped to do that work?

A. Nobody does that outside of myself. Mr. Davis takes care of my boats, and if any new equipment is necessary I tell him to go and get it, to keep them in running condition.

Q. How many vessels did you own in May and June, 1923?

A. Four large boats in San Francisco.

Q. What were they?

A. The 'Iolanda', the 'Henrietta', the 'Corona' and the 'Three Sisters' " (224, 225).

"Q. Who employed the captains for the boats?

A. I do, with the assistance of my Port Engineer" (226).

"Q. Who hired the crews of the boats?

A. I hired the head fisherman and my head fisherman hires the other fishermen. * *

Q. That has to do with the head fisherman; who took care of the employment of the deck hands, such as Anderson, who was the deck hand on the 'Three Sisters'.

A. The port engineer" (227).

"Q. How, if at all, would you, as president of the company, hear of the need of a new towline?

A. That was the instruction given to my port engineer—anything that was necessary, to get anything at all for the maintaining and upkeeping of those boats, for him to go and get it.

Q. Would he ever report the need of any particular thing to you?

A. Well, if it was something that amounted to lots of money he would, but small things like

that—a tow-line, or ropes, or anything like them —he had orders to go and get them.

Q. How about authority to purchase such a thing as a bridle without referring it to you —would he have such authority?

A. Oh, yes. We give him an order blank, and everything he purchases he puts down on the order blank and turns a duplicate copy in to the office and states what it is for" (231, 232).

"Q. Had Kruger, or Carlton, or Davis, any one of them, ever reported to you or to your office, to your knowledge, that the tow-line or the bridle the 'Three Sisters' was using was inefficient?

A. No, sir.

Q. In the course of the business, who would report to you the need of a new tow-line, if you had needed one?

A. Mr. Davis, the port engineer—whoever was port engineer at the time.

Q. The directors whom you mentioned as not having anything to do with the office work, did they have anything to do with the vessels?

A. No, sir.

Q. Did any of the other officers have anything to do with the vessels?

A. No, sir. If I happened to be out of town and my brother was there, if he had any instructions he would tell the port engineer in the morning what instructions he had, the same as I would, in case I happened to be out of town.

Q. Which brother is that?

A. Walter.

Q. And would those instructions cover anything other than to send a vessel here or send a vessel there, or to go here for fish, or to go there for fish?

A. No. We have two fishing boats. They go fishing every day but Saturday. Those boats are out every day but Saturday. All Mr. Davis has to do with those boats is to see that they are kept up, and to buy whatever equipment is necessary for fishing. Then we have another boat that goes to pick up the fish, up at Point Reyes or at Bodega Bay. If the boats are out they will ring us up that they are in and have some fish. Mr. Davis passes out the word to go to Point Reyes, or to Bodega Bay, or to wherever it may be, and bring the catch in that night.

Q. Does A. Paladini, Inc., buy fish from other fishermen?

A. Yes.

Q. What proportion of the fish that you wholesale do you catch and bring in yourself?

Mr. HEIDELBERG. I cannot see the materiality of that, your Honor.

Mr. LILLICK. The materiality of it is very plain. We are trying to convince the Court, and counsel on the other side, that this operation of the vessels was a very small part of the business of A. Paladini, Inc., wholesale fishermen.

Mr. HEIDELBERG. It happens to be a very important part in this instance.

Mr. LILLICK. Then you should not object to it.

The COURT. I will let him answer it.

A. About 20 or 25 per cent'' (232, 233, 234).

Here follows such parts of the testimony of Port Engineer Davis as deal with his powers and duties as Port Engineer:

"Q. After being employed as such what were your duties?

A. The care and maintenance of the boats and equipment.

Q. With reference to repairs that might be needed upon any of the boats, what did you do?

A. I went ahead and done them or had them done.

Q. Had Mr. Paladini anything to do with them?

A. No, sir.

Q. Did Mr. Paladini have anything to do with the actual management of the vessels in so far as their operation was concerned?

A. Nothing.

Q. Did he inspect the vessels himself?

A. Not that I know of.

Q. What happened if, for example, one of the vessels needed repairs in her engine room, what did you do?

A. Made arrangements to have them done, or done them myself.

Q. Whose discretion was used as to that?

A. Mine.

Q. Did you have anyone over you in any way, Mr. Davis?

A. No one" (178, 179).

"Q. Whose duty was it to see that this towline was good and efficient?

A. My duty.

Q. What employee of A. Paladini inspected vessels belonging to the Company to pass upon their need for new equipment?

A. I did" (183).

"Q. Mr. Davis, from whom do you obtain your instructions as to what shall be done with the vessels?

A. Well, if I don't know myself I go to A. Paladini.

Q. What is the situation with reference to orders for the four vessels which you are now

operating; in other words, where do you obtain your instructions as to what you shall do with those vessels?

A. From the main office.

Q. Have you anything to do individually with where they shall operate?

A. No.

Q. You said a moment ago if you didn't know yourself you got your orders from the main office.

A. Yes.

Q. Where does the information or instruction come from that you referred to as that which you know yourself?

A. I couldn't get that question?

Q. You exercise no independent judgment, do you, about how the vessel shall operate; you are always acting under the orders from the main office, are you not?

A. Yes, sir.

Q. And those orders always come from the main office?

A. Yes.

The COURT. Q. Did Mr. Paladini tell you definitely to send the 'Three Sisters' after the pile driver and the 'Corona' after the workmen, or was that your judgment?

A. Your honor, I didn't quite get that.

Q. You sent the 'Three Sisters' after the pile driver and the barge?

A. Yes.

Q. Did Mr. Paladini tell you to do that?

A. Yes.

Q. You told the 'Corona' to go up and get the men, did you?

A. I did.

Q. Did Mr. Paladini tell you to do that?

A. He did" (184, 185).

"Mr. HEIDELBERG. Q. You take your orders from A. Paladini?

A. Yes.
Q. Where does he give you those orders?
A. Up at the market" (206).

It is submitted from the foregoing that, far from showing that "the actual operation of the vessels, the equipment of the vessels, the running of the vessels was intrusted to its port engineer," the record here shows (1) that the actual operation of the vessels was intrusted to their respective masters (selected by petitioner's president and general manager, Alexander Paladini), and their crews (selected by the port engineer); (2) that the equipment, repair and inspection of the vessels was intrusted to the port engineer (a competent man employed by the company for that purpose), and (3) that the running of the vessels was effected solely by instructions from the main office of petitioner and from the president and general manager in particular when he was in San Francisco.

Port Engineer Davis, it is submitted, under his restricted powers, was neither a "managing officer" nor a "higher officer" of the petitioner corporation. He was at most a mere employee charged with transmitting the directions of the head office of the company to the various masters of the company's vessels, and specifically charged with the duty to keep petitioner's vessels repaired and properly equipped.

The authorities cited by claimants on this point would seem to establish the rule that where the re-

sponsibility to render a vessel seaworthy has either been delegated to, or assumed by, a corporate officer, such as a *general superintendent* or other corporate officer having *general managerial powers,* and such officer is with privity or knowledge, limitation should be denied.

The first case cited by claimants is that of *"The Erie Lighter 108,"* 250 Fed. 494 (D. C. N. J.). That was a cause of limitation upon the petition of Erie Railroad Company, the owner of a lighter, on account of personal injuries to the master of a tug. *It was there held that petitioner was without privity or knowledge* and was consequently entitled to limit its liability. The question was raised as to whether an officer of petitioner to whom had been delegated *the general management and superintendence* of its marine department was a "managing officer" whose privity or knowledge would deprive the company of the right to limit. The court held that the superintendent was a "managing officer," but without privity or knowledge. In view of the general powers possessed by that officer, the holding was unquestionably correct. However, how can such an officer be compared to petitioner's port engineer? Bringing the comparison to the Pacific—could the superintendent of the Marine Department of the Southern Pacific or the O. W. R. & N., who are plainly "managing officers" of their respective companies, be compared to port engineer Davis, a mere employee with no managerial authority whatsoever in his department. The italicized

portions of the opinion from "The Erie Lighter 108" set forth on page 84 of claimant's brief might well be cited for petitioner. Davis is patently not "one to whom the corporation has committed the general management or general superintendence of the whole or a particular part of its business."

The case of *Weishaar v. S. S. Co.,* 128 Fed. 400, (C. C. A. 9), cited by claimants, contains the following statement by the court which obviates any further comment on the case:

> "Moreover, the evidence shows that the negligence of the officer in command of the boat was committed in the personal presence and within the actual knowledge of the president of the appellee corporation, who, so far from seeking to enforce the performance of his duty by that officer, acquiesced in his neglect of duty, as affirmatively appears from the president's own testimony."

"The Teddy," 226 Fed. 498, was a limitation proceeding where the alleged craft was a moving platform for the support of a derrick—not a ship at all. The court, after some hesitation, affirmed admiralty jurisdiction but denied limitation because of the privity and knowledge of the superintendent of petitioner. *There is nothing in the opinion to show what the general powers of the superintendent were.* We submit that it is the extent of a corporate agent's general authority which determines whether or not he is a "managing officer" and a case like *"The Teddy",* which finds that an officer called a superintendent was *empowered* to do a specific act,

but does not enlighten us as to the scope of his general managerial powers in his position with his company, is without value as a precedent here.

Claimants have cited *"The Colima,"* 82 Fed. 665 (D. C. N. Y.). In that case limitation was allowed. By way of dicta, readily indentified as such, the court said:

> "If Mr. Schwerin, the superintendent, had been either *charged personally* with the duty of directing or managing the distribution of this cargo, with reference to the stability of the ship, *or had assumed that function,* the company would PERHAPS have been 'privy' to any defects in loading * * *. *However that may be, Mr. Schwerin had no such duty and assumed no such function.*"

It does not appear in the opinion what the *actual powers* of the superintendent were, but he must have been a person of consequence in the management of the company's business in view of the portion of the opinion above quoted.

The case of *Oregon Round Lumber Co. v. Portland and Asiatic S. S. Co. et al.* (District Court D. Oregon, 1908), 162 Fed. 912, cited by claimants, is not in point.

That was a case where limitation was denied because the *manager and superintendent* of the petitioner had not employed a competent man to condition the vessel but had *personally* looked after the matter. Both the manager and superintendent were plainly "managing officers" of petitioner, and they

both being with privity and knowledge, limitation was properly denied. The following portion of the opinion shows the inapplicability of the case to the facts here presented:

> "No expert or other person was appointed by the manager or superintendent of the lumber company to make a survey of the barge 'Monarch' to determine with respect to her seaworthiness or fitness to undergo the service to which she was appointed under the demise; but *these officers depended solely upon their own skill and ability for ascertainment as to her condition.*"

In the case of *Re Reichert Towing Line,* 251 Fed. 214 (C. C. A. 2, 1918), limitation was denied for the reason that the owners had not "discharged the burden of proving their want of knowledge or privity," the privity and knowledge in that case being brought home to the owners themselves. The holding has no application here.

Myers Excursion & Nav. Co., 57 Fed. 240, is the District Court's determination of the case of *"The Republic,"* 61 Fed. 109, elsewhere in this brief cited. Under no construction of any part of that opinion can claimants support the contention of their citation.

Judge Gilbert of this court, in the case of *The Annie Faxon,* 75 Fed. 312, in considering the case of *Myers Excursion & Nav. Co.:*

> "The decision is placed on the ground that it was the duty of the corporation, before sending the vessel on the voyage in question, to

> know, by the examination by some proper officer, whether the vessel was fit for the intended voyage. *But the Court did not hold, nor is it implied in the decision, that, if a proper and competent officer had been appointed by the corporation to make such examination, the knowledge acquired by him would be imputed to the company.*"

Regarding the case of *Breaker v. Jarvis Co.*, 166 Fed. 987, claimants' quoted portion of the opinion following:

> "It is well settled that the owner of a vessel is not entitled to limit its liability arising from unseaworthiness of a vessel"

does not state the law.

There is neither reason nor precedent for holding that "the owner of a vessel is not entitled to limit its liability arising from unseaworthiness of a vessel" when, by the plain and comprehensive wording of Sec. 4283 R. S. it is provided that an owner may limit" for any act, matter or thing, loss, damage or forfeiture done, occasioned or incurred without the privity or knowledge of such owner or owners." Surely it cannot be contended that when such "act, matter or thing, loss, damage or forfeiture" results from unseaworthiness, the owner cannot limit his liability. It is readily observed that most of the cases on the question of privity or knowledge where limitation has been allowed, are cases where the loss arose from a condition amount-

ing to unseaworthiness. We need only mention a few of such cases:

The Annie Faxon, 75 Fed. 312 (C. C. A. 9), —Defective boiler;

Van Eyken v. Erie R. Co., 117 Fed. 712 (D. C. N. Y.)—Defective set screw;

Quinlan v. Pew, 56 Fed. 111 (C. C. A. 1, 1893)—Structural defect—failure of master to inspect and report.

In *Quinlan v. Pew, supra,* the court held that even in the presence of a *warranty of seaworthiness* the owner might limit liability, Circuit Judge Putnam saying:

> "Neither can the proposition of the appellant be maintained, that the statute does not apply, because there was in this case a personal contract on the part of the owners, either express or in the form of an implied warranty, that the vessel was seaworthy. In nearly all the instances which the statute expressly enumerates as those to which the limitation of liability applies, there is necessarily an implied warranty, and frequently an express agreement in the form of a bill of lading; so that, if the contention of the complainant is correct, the wings of the statute would be effectually clipped."

We would again quote from the opinion of the court in the case of *Pocomoke Guano Co. v. Eastern Trans. Co.,* 285 Fed. 7 (C. C. A. 4, 1922), (which was a case involving an unseaworthy barge), the following, which disposes of claimants' contention that there can be no limitation where unseaworthiness exists:

> "They are likewise exempt from liability for the negligence of third persons employed to repair and put the barge in seaworthy condition where they have, in good faith, exercised due diligence and care in the selection of such persons."

In concluding our argument on this point we will quote from the opinion of the court in claimants' much cited case of *Oregon Round Lumber Co. v. Portland & Asiatic S. S. Co.,* 162 Fed. 912:

> "It may be, however, that the unseaworthiness was occasioned or incurred without the privity or knowledge of the owner. It is then that section 4283, Rev. St. (U. S. Comp. St. 1901, p. 2943) comes to the aid of the owner and limits his liability to the value of the craft, so that the liability becomes in effect the liability of the craft only."

In *Parsons v. Empire Shipping Co.* (C. C. A. 9, 1901), 111 Fed. 20, limitation was properly denied as the loss arose with the privity and knowledge of the *general superintendent* of petitioner who was in charge of petitioner's *entire business* in Alaska. The following portions of the opinion are sufficient to dispose of the case as an authority here:

> "To that point was assigned, at the opening of the season of 1899, as the *general superintendent of all of the company's business in that region,* Capt. Bloomburg, who, as has been said, not only superintended the construction of the barges and some of the steamers of the company in New Jersey, but had had, as appears in the record, an extensive experience as

> superintendent of various other transportation companies. There is no doubt from the evidence that he was competent for the position assigned him. He left Seattle for St. Michael early in June, 1899, but arrived at his point of destination so ill that he was compelled to return by the same ship, leaving St. Michael, June 12th and leaving *in his place* and in charge of *all the business of the appellee at St. Michael,* F. G. Patterson, who had been sent there by the appellee as the assistant of Capt. Bloomsburg, and was designated freight and passenger agent. *The appellee was advised of Bloomsburg's illness and return and of the fact that Patterson had been put in his place in charge of the company's business at St. Michael, and Patterson was by appellee permitted to remain during the balance of the season.* * * *"
>
> "So that Patterson, an inexperienced man, with full knowledge of appellee's general manager for the Pacific Coast, was allowed to act as *general superintendent of all of its business at St. Michael,* including the control of the entire fleet in those waters."

Oregon Round Lumber Co. v. Portland & Asiatic Co., 162 Fed. 922 (D. C. Ore.), cited on pages 13, 86 and 88 of claimants' brief, and from which quotation is above made, held that the owner was with privity and knowledge where a barge was unseaworthy and *the superintendent and the manager* of the owner had personally made a casual inspection by going through her hold without lights. The court there said:

> "They were thus dependent upon their own diligence, and for their lack of diligence in discovering at least what was or would have been

> apparent upon inspection to an unskilled person the corporation would be responsible."

It is submitted that there are no facts in that case which are in any way similar to those in the present record on the point of due inspection of either the "Three Sisters" or her equipment.

(b) Petitioner's Port Engineer and Master Were Competent and Petitioner Used Due Diligence in Selecting Them.

There is, we submit, nothing in the record to show that either Port Engineer Davis or Captain Kruger was incompetent.

Port Engineer Davis was a licensed man of extended experience (including towing) upon the waters of the Mississippi, San Joaquin and Sacramento Rivers and the Pacific Ocean and had been around boats and engines "as far back" as he could remember. He rebuilt the engines of the "Corona" and served as her chief engineer before he became port engineer. (186). We would refer the court on the question of Davis' experience to pages 177, 186, 187, 188 and 189 of the record, where will be found his testimony as to his experience.

Captain Kruger's experience is detailed in his testimony on pages 69 to 73, inclusive, of the record. His testimony shows him not only to have been a licensed master of vessels of the type of the "Three Sisters" plying upon the Pacific Ocean and the particular waters in question for a period since the year 1917 but shows him to have had an extensive

experience in towing barges upon these identical waters.

In employing Davis as port engineer the record shows that Alexander Paladini, the president and general manager of petitioner, knew of Davis' work upon the "Corona," his work for Fairbanks-Morse, and had inquired of Mr. Cooper of the Peterson Launch and Towboat Co. about him before employing him. Mr. Cooper recommended Davis highly (230).

At the time when Alexander Paladini employed Captain Kruger he knew of his work for F. E. Booth (master of over four vessels, (71)) and understood that Kruger "had a wonderful reputation." He inquired of F. E. Booth about Kruger and Booth told him that Kruger was one of his "pet men," was "on the job all the time" and that he "hated to see him go." After this talk with Booth, Alexander Paladini instructed his port engineer to employ Kruger (226, 227).

Under such circumstances how can it be reasonably said that petitioner was negligent in employing either Davis or Kruger?

Davis and Kruger were, it is submitted, in the language of the court in the case of *Pocomoke Guano Co. v. Eastern Trans. Co., supra,* "trustworthy, experienced, and capable of performing the service, and of good reputation in the business." We again quote from the opinion in *The Oneida, supra,* a passage which is particularly fitting here:

"There is no evidence in the record indicating that appellee's launchman was incompetent. His long period of service with appellee and his familarity with the waters in question negatives the idea of incompetency and leads us to conclude that the "Oneida" was properly manned at the time of towing."

2. Section 4493 Revised Statutes Does Not Affect Petitioner's Right to Limitation.

As a closing contention claimants urge that because petitioner did not have its vessel inspected under the hull and boiler inspection provisions of the Act of February 28, 1871 (16 Stat. L. Chap. 100, p. 440 and fol.), "An Act to provide for the better security of life on board of vessels *propelled in whole or in part by steam,* and for other purposes," it cannot limit its liability by reason of the provisions of Section 43 of said act (Sec. 4493 R. S.).

This contention, as it will now be shown, is utterly unfounded.

The Act of 1871 was the culmination of the efforts of Congress to protect the lives of passengers aboard *steam vessels.* The history of the act shows it to have had its origin in the Act of July 7, 1838 (5 Stat. L. Chap. cxci, p. 304 and fol.) of similar title. (See Sec. 71 of the Act of 1871, 16 Stat. L. at p. 459). The particular section of the Act of 1871, upon which claimants rely (Sec. 43, now Sec. 4493 R. S.) first appeared in its present (substantial) wording as Sec. 30 of the Act of August 30, 1852 (10 Stat. L. at pp. 72 and 73).

The provisions of Sec. 30 of the Act of 1852 are identical with those of Sec. 4493 R. S. except that the words "if it happens through any neglect to comply with the provisions of law herein prescribed" in the Act of 1852 have been changed to "if it happens through any neglect or failure to comply with the provisions of this title," in Sec. 4493 R. S., and the provisions immediately following the word "hull" of the Act of 1852, which provisions do not affect the owner, (and with which we are not now concerned) have in Sec. 4493 R. S. been extended so as to give rights *in personam* against the "Master, mate, engineer and pilot" instead of against "an engineer or pilot" as provided in the Act of 1852. It appears then that since 1852 we have had in force substantially the same statutory provision that claimants now argue is applicable.

Section 4493 R. S., it will be seen at a glance, gives to *passengers* upon *steam vessels* two different remedies. The first part of the section gives full recovery as against the "Master and the owner of such vessel, or either of them, and the vessel," "if it happens through any neglect or failure to comply with the provisions of this title, or through known defects or imperfections of the steaming apparatus or of the hull," and the portion of the section succeeding the word "hull" gives rights against the "Master, mate, engineer or pilot" *in personam,* but does not affect the owner or vessel.

It is apparent, then, that the portion of Sec. 4493 following the word "hull" can be ignored here.

An analysis of the first portion of Sec. 4493 shows that its effect is as follows:

(1) Where upon a steam vessel, a passenger or his baggage has sustained damage

(2) He is entitled to full recovery against the vessel or her owner, *if*

(3) Such damage happened:

(a) Through any neglect or failure to comply with the provisions of the title of which the act is a part (Inspection provisions for steam vessels), or

(b) Through known defects or imperfections of the *steaming apparatus* or the hull.

To entitle claimants to the benefit of this statute, they must have been injured aboard a *steam vessel,* they must have been *passengers,* and the *cause* of their injuries must have been either the failure to secure inspection, or known defects or imperfections of the steaming apparatus or the hull. We will now separately consider these requisites, none of which we submit, is present in the case at bar.

1. Claimants were injured aboard a 58-foot Deisel launch. She was not propelled in any way by steam.

2. Claimants, being transported gratuitously after the completion of their work for Healy-Tibbitts Construction Company, were not passengers,

as has been shown in the forepart of this brief (page 4 and fol. *ante*).

3. Claimants were not injured through any failure to secure inspection. The vessel was not subject to inspection. But even it if had been so subject, there is no evidence in the record showing that the cause of the breaking of the borrowed bridle was a defect which would have been discovered by inspection.

4. Claimants were not injured through any known defect or imperfection of the steaming apparatus or the hull.

Claimants state on page 93 of their brief that "The Title referred to in R. S. 4493 is 'Steam Vessels' but by amendment of 1918 'Steamer' was changed to 'any vessel.'" This statement is not supported by the enactment referred to.

The Act of Feb. 14, 1917, Ch. 63, 39 Stat. L. 918 (Fed. Stat. Ann. 1918, Supp. 827) changed the word "Steamer" in R. S. Sec. 4465 to "any vessel." R. S. Sec. 4465 is but one of the many sections of the "Title" referred to by R. S. Sec. 4493. The title and context of the Act of 1917 heretofore referred to lends no support to claimants' misleading statement.

Again, claimants cite Sec. 4427, R. S. as authority for their contention that the "Three Sisters" was subject to inspection as a "tug boat," "towing boat," or "freight boat." She was, we submit,

properly considered, nothing but a private fishing boat which was occasionally used for doing her owner's towing. However, it is apparent from the reading of Sec. 4427 R. S. that only *steam vessels* are within its contemplation. It should be noted that Sec. 4427 R. S. is a substantial re-enactment of Sec. 59 of the Act of Feb. 28, 1871.

The Supreme Court of Massachusetts in the case of *Commonwealth v. Breakwater Co.,* 214 Mass. 10, 100 N. E. 1034, said of the effect of R. S. Sec. 4427:

> "It has been argued that 'No. 43' is a 'freight boat' within U. S. Rev. Stat. Sec. 4427. But the terms of this Section, its general purpose and context and other Sections of its title, as well as 35 U. S. Stat. at large, 428, C. 212, of 1908, indicate that *it applies only to vessels propelled in whole or in part by steam* (U. S. Rev. Stat. Sec. 4399 [U. S. Compl. Stat. 1901, p. 3015] and has no relation to a craft like this."

The first section of the "Title" referred to by Sec. 4493 R. S. is a section which is definitive of the vessels coming within the provisions of the Act of 1871. Sec. 4399 R. S. follows:

> "Sec. 4399 (what vessels are deemed steam vessels). Every vessel propelled in whole or in part by steam shall be deemed a steam vessel within the meaning of this title."

That the provisions of Section 4493 R. S. and Sec. 4427 R. S. apply only to steam vessels is patent from an examination of the Act of 1871, from which they are taken where, in practically every section,

there is exclusive reference to steam vessels. The reason for this conclusion is evident when it is considered that the Act of 1871 was passed before the advent of motor vessels. In 1871 there were but two classes of craft, sail and steam.

In reconciling the limitation statutes with Sec. 4493 R. S. District Judge Choate in the case of *In re: Long Island Transportation Co.,* 5 Fed. 599, at p. 624, said:

> "The damage must not have happened through any neglect or failure to comply with the regulations of the statutes relating to *steam vessels,* nor through known defects of the steaming apparatus or hull."

In *Hines v. Butler,* 278 Fed. 877 (C. C. A. 4, 1921) cited by claimants on page 95 of their brief, the court said:

> "It is difficult to resist the conclusion and the reasoning of the Circuit Court of Appeals of the Ninth Judicial Circuit in the case of The Annie Faxon, 75 Fed. 312, 21 C. C. A. 366. Interpreting the provisions of the Act of 1851 with those of the Act of 1871, or sections 4282, 4283, and 4493, together, the construction would appear to be that as they are statutes upon the same subject, that the earlier one creates a general rule of limitation of liability as then existing and the later statute proceeds to make exceptions for the better security and in favor of passengers. The earlier act applies to all vessels; *the later act applies only as to affording better security of life on board of steam vessels,* where the risk of fire may be greater."

The Annie Faxon, 75 Fed. 312 (C. C. A. 9) was a case where limitation was granted except as to passengers who were injured by the *boiler explosion* which occasioned the loss. That was a case where the cause of loss was reasonably connected with the failure of the owner to comply with the inspection requirements for steam vessels. There is no such *causal connection* here, even had the breaking of the bridle occurred upon a vessel subject to inspection.

III. CONCLUSION.

We respectfully submit that it is established:

I. That claimants were not passengers and that at most the only duty owed them by petitioner was that of using ordinary care and diligence in making the tow.

II. That petitioner was not delinquent in its duty toward claimants, claimants not having sustained the burden of proving the negligence charged by them by either (a) the production of evidence of negligence, or (b) the proof of circumstances from which the inference of negligence would follow in the absence of an explanation (*res ipsa loquitur*).

III. That claimants by their pleading and proof have precluded themselves from reliance upon any presumption of negligence, there being no necessity or legal possibility for "the thing speaking for

itself'' (*res ipsa loquitur*) after claimants have "spoken for it."

IV. That the doctrine of inevitable accident is inapplicable.

V. That even if the doctrine of inevitable accident should be applied it has been satisfied.

VI. That the accident occurred without the privity or knowledge of petitioner.

VII. That Sec. 4493 R. S. is not a bar to petitioner's right of limitation.

In conclusion we earnestly urge that the determination of the District Court arrived at after hearing the evidence and having before it the witnesses themselves to judge of their veracity and after having viewed the vessel, should not be disturbed.

Dated, San Francisco,
March 21, 1925.

Respectfully submitted,

HOMER LINGENFELTER,
IRA S. LILLICK,
Proctors for Appellee.